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No. 98 -

IN THE

Supreme Court of the United States

October Term, 1998

IN RE KAREN SPRING DAY,

Petitioner.

On Petition For A Writ Of Certiorari To The District Of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether disbarring an attorney as "reciprocal discipline" without any prior admission, adjudication, or consideration of evidence of wrongdoing that would warrant disbarment violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. Whether disbarring an attorney as "reciprocal discipline" without notice of the nature of the charges she was required to meet before the proceedings began violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

3. Whether disbarring an attorney as "reciprocal discipline" without a fair opportunity to challenge the underlying accusations of misconduct as false violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

OTHER PARTIES

Leonard H. Becker, Esq.
Office of Bar Counsel
The Board on Professional Responsibility
District of Columbia Court of Appeals

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No. 98 -

IN THE

Supreme Court of the United States

October Term, 1998

IN RE KAREN SPRING DAY,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Karen Spring Day, through her counsel, petitions for a writ of certiorari to review the decision and judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., 1a-15a) is reported at 717 A.2d 883 (D.C. 1998). The report and recommendation of the Board on Professional Responsibility (App., 25a-44a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1998 (App., 1a, 15a). A timely petition for rehearing and rehearing en banc was denied on January 19, 1999 (App.,16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

UNITED STATES CONSTITUTIONAL PROVISIONS, STATE STATUTES, AND RULES OR REGULATIONS

The Fifth Amendment of the United States Constitution provides in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

Rule XI, § 11(c) of the Rules Governing the District of Columbia Bar is as follows:

> Reciprocal discipline shall be imposed unless the attorney demonstrates, by clear and convincing evidence, that:
>
> (1) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistently with its duty, accept as final the conclusion on that subject; or
>
> (3) The imposition of the same discipline by the Court would result in grave injustice; or
>
> (4) The misconduct established warrants substantially different discipline in the District of Columbia; or
>
> (5) The misconduct elsewhere does not constitute misconduct in the District of Columbia.
>
> Unless there is a finding by the Board under (1), (2), or (5) above that is accepted by the Court, a final determination by a disciplining court outside the District of Columbia or by another court in the District of Columbia that an attorney has been guilty of professional misconduct shall conclusively establish the misconduct for the purpose of a reciprocal disciplinary proceeding in this Court.

D.C. Bar Rule XI, § 11.

STATEMENT OF THE CASE

Karen S. Day was admitted to the Bar of the District of Columbia Court of Appeals in 1981. App., 2a. The following year, she moved to Florida to be closer to her family, and became a member of the Bar of the Supreme Court of Florida. *Id.* She has lived in Florida since 1982.

Nearly 11 years ago, Ms. Day's former husband stole funds from her client escrow account. See App., 3a. Florida Bar Counsel began an investigation to determine whether Ms. Day was guilty of "serious trust account misappropriations," "improper and inadequate trust account record keeping and instances of trust checks returned by the bank for insufficient funds." *In re: Florida Bar, Resignation of Karen S. Day*, Case No. 72,794, Florida Bar Counsel Response in Opposition to Petition for Leave to Resign at 1 (Aug. 30, 1988) (App.,47a); see App., 3a. Before the investigation was completed and before Florida Bar Counsel had decided whether any charges were appropriate, Ms. Day resigned from the Florida Bar, without leave to seek reinstatement, rather than endure formal disciplinary proceedings in which she could clear her name only by testifying against her husband, the father of her two young children. *Florida Bar v. Karen S. Day*, 537 So.2d 570 (Fla. 1988)(App., 56a); see App., 3a . Florida Bar Counsel then terminated his investigation. App., 30a. Neither Florida Bar Counsel nor any judicial or other tribunal made any determination as to the merits of the allegations or any defenses Ms. Day might have raised.

Ms. Day remained a member of the Bar of the District of Columbia Court of Appeals until December, 1996. In the 11 years since she resigned from the Florida Bar, Ms. Day has divorced her former husband, remarried, and tried to rebuild her life. In May, 1995, seven years after she resigned from the Florida Bar, Ms. Day began the process of trying to salvage some part of her legal career. She started an

immigration law practice, limited to work before federal immigration authorities. App., 4a.[1]

In September, 1996, District of Columbia Bar Counsel forwarded a certified copy of documents relating to Ms. Day's 1988 resignation from the Florida Bar to the District of Columbia Court of Appeals. See App., 4a, 25a. Ms. Day was summarily suspended from the District of Columbia Bar, effective December 21, 1996.[2] Following her summary suspension by the court of appeals, Ms. Day submitted evidence to the District of Columbia Board on Professional Responsibility (the "Board"), showing that she was not guilty of misappropriation, because her former husband, not she, had stolen the money from her client escrow account. See App., 39a-42a. Although there is no evidence in the record indicating that Ms. Day participated in any way in her former husband's theft, the Board concluded that Ms. Day's voluntary resignation was equivalent to permanent disbarment in Florida and recommended that Ms. Day be disbarred in the District of Columbia as "reciprocal discipline." App. 43a-44a.

The court of appeals accepted the Board's recommendation. The court rejected Ms. Day's argument that disbarment under the circumstances of this case would violate her rights to procedural due process. App., 5a-7a. The court held that Ms. Day's resignation from the Bar under the 1988 Florida procedure is "discipline" sufficient to support "reciprocal" disbarment in the District of Columbia. App., 4a-5a. The court acknowledged the evidence in the record that Ms. Day had introduced to show she was not guilty of misappropriation and that she, like her clients, was the victim

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[1] A lawyer may practice before many federal administrative agencies if she is a member in good standing of the Bar of the District of Columbia Court of Appeals or the highest court in any State. Ms. Day did not hold herself out as a member of the Florida Bar. *See* App., 4a.

[2] *In re Day*, Order (Nov. 21, 1996), App.,18a-20a; Order (Dec. 21, 1996), App.,21a-22a, *rehg. denied*, Order (May 28, 1997), App., 23a.

of her former husband's theft. App., 11a. The court rejected this evidence as insufficient to avoid disbarment in the District of Columbia on the ground that Ms. Day's resignation from the Florida Bar "waived" her right to contest the underlying allegations of misconduct, in Florida and in the District of Columbia, and "estopped" her from asserting the absence of any evidence of wrongdoing in the Florida proceeding as a basis for avoiding reciprocal discipline in the District of Columbia. App. 7a, 10a.

Moreover, according to the court of appeals, none of the recognized exceptions to reciprocal discipline was applicable and Ms. Day should be disbarred in the District of Columbia, because the evidence she submitted to show that she had not stolen any client funds did not show what steps she had taken to prevent her former husband's theft. App., 10a-15a. Remarkably, the court of appeals asserted that Ms. Day's failure to proffer such evidence on appeal was sufficient to deny her any opportunity to respond to this new and unprecedented basis for disbarment in the District of Columbia, suggested for the first time in the Board's opinion recommending disbarment and based entirely on evidence Ms. Day had submitted to respond to the initial claim of misappropriation. App., 12a.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals for two reasons. First, the judgment of the court of appeals conflicts with the basic requirements of procedural due process as defined by this Court. See *In re Winship*, 397 U.S. 358 (1970); *In re Ruffalo*, 390 U.S. 544 (1968); *Theard v. United States*, 354 U.S. 278 (1957); see also *Selling v. Radford*, 243 U.S. 46 (1917). Second, the permissible standards for imposing "reciprocal" discipline are important to the administration of attorney discipline in state and federal courts throughout the United States. Virtually every lawyer in the United States -- in–house counsel and

outside counsel, litigators and transactional lawyers -- may be subject to the disciplinary jurisdiction of two or more state and federal courts and thus subject to reciprocal discipline.

I. THE JUDGMENT OF THE DISTRICT OF COLUMBIA COURT OF APPEALS CONFLICTS WITH THE BASIC REQUIREMENTS OF DUE PROCESS.

The holding of the District of Columbia Court of Appeals is inconsistent with the basic requirements of the Due Process Clause of the Fifth Amendment to the United States Constitution in three different respects. First, requiring Ms. Day to prove her innocence to avoid punishment in the District of Columbia, although no previous tribunal had ever adjudicated or even considered any evidence that Ms. Day was guilty of any wrongdoing, is inconsistent with the principles of procedural due process articulated in *In re Winship*, 397 U.S. 358 (1970). Second, disbarring Ms. Day for an offense that was not suggested as a basis for disbarment until after she had responded to the initial accusations conflicts with the holding of this Court in *In re Ruffalo*, 390 U.S. 544 (1968). Third, as applied by the court of appeals in this case, the reciprocal discipline procedures in the District of Columbia denied Ms. Day a meaningful hearing, because they precluded any consideration of the merits of the underlying accusations.

A. Disbarment Without Evidence of Wrongdoing Denies Due Process.

"Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer." *In re Ruffalo*, 390 U.S. 544, 550 (1968), citing *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866); *Spevack v. Klein*, 385 U.S. 511, 515 (1967). Withdrawal of a lawyer's right to practice her profession is a significant deprivation of a liberty interest that is not less severe because it does not result in a jail term. In some cases, disbarment is plainly a more severe penalty than a fine, probation, or a host of other criminal sanctions. As the

court of appeals acknowledged, therefore, a lawyer is entitled to procedural due process before punishment is imposed in either an original discipline case or a reciprocal discipline case. App., 5a; see, *e.g.*, *Ruffalo*, 390 U.S., at 550 (1968); *In re Pearson*, 628 A.2d 94, 99 (D.C. 1993); *In re Williams*, 464 A.2d 115, 118-19 (D.C. 1983); see generally *Theard v. United States*, 354 U.S. 278 (1957); *Selling* v. *Radford*, 243 U.S. 46, 51 (1917).[3]

The Constitution generally prohibits the State from imposing punishment, except upon proof of guilt beyond a reasonable doubt. See *Winship*, 397 U.S., at 362, quoting *Leland* v. *Oregon*, 343 U.S. 790, 802-803 (1952)(Frankfurter, J., dissenting): "[i]t is the duty of the Government to establish ... guilt beyond a reasonable doubt. This notion -- basic in our law and rightly one of the boasts of a free society -- is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'"

In *Winship* this Court held that the Due Process Clause requires the State to prove guilt beyond a reasonable doubt in a juvenile delinquency proceeding in which a child was accused of conduct that would be criminal if committed by an

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[3] The American Bar Association ("ABA") Standards for Imposing Lawyer Sanctions 2.9 define "reciprocal" discipline as follows: "Reciprocal discipline is the imposition of a disciplinary sanction for conduct for which a lawyer has been disciplined in another jurisdiction." ABA/BNA *Lawyers Manual on Professional Conduct* 01:801, 01:814 (1999). The Commentary to this standard explains: "Public confidence in the profession is enhanced when lawyers who are admitted in more than one jurisdiction are prevented from avoiding the effect of discipline in one jurisdiction by practicing in another. MRLDE 22 [Model Rules for Lawyer Disciplinary Enforcement, Rule 22] provides that a certified copy of the findings of fact in the disciplinary proceedings in the other jurisdiction should constitute conclusive evidence that the respondent committed the misconduct. Reciprocal discipline can be imposed without a hearing, but the court should provide the lawyer with an opportunity to raise a due process challenge or to show that a sanction different from the sanction imposed in the other jurisdiction is warranted." *Id.*

adult, even though "a delinquency adjudication 'is not a 'conviction'. . .; that it affects no right or privilege, including the right to hold public office or to obtain a license[;]...a cloak of protective confidentiality is thrown around all the proceedings," "'[t]he delinquency status is not made a crime; and the proceedings are not criminal.'" 397 U.S., at 365 (quoting the rationalizations offered by the New York Court of Appeals as to why a preponderance of the evidence standard should be acceptable in a juvenile delinquency proceeding). Thus, the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he [or she] is charged." *Id.*, at 364. This Court unequivocally rejected the notion that labeling the proceeding something other than a criminal trial avoids this constitutional requirement.[4]

In a so-called "reciprocal" discipline proceeding, the usual, constitutionally-mandated burden of proof is reversed. An attorney who has admitted or been adjudged guilty of professional misconduct in one jurisdiction may be required to "show cause" why she should not be disciplined in the same manner for the same conduct in any other jurisdiction in which she is a member of the Bar. See, *e.g.*, *Theard*, 354 U.S., at 382; *Selling*, 243 U.S., at 48-9. Reversal of the

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[4] "In effect the Court of Appeals distinguished the proceedings in question here from a criminal prosecution by use of what *Gault* called the 'civil label-of-convenience which has been attached to juvenile proceedings.' 387 U.S., at 50. But *Gault* expressly rejected that distinction as a reason for holding the Due Process Clause inapplicable to a juvenile proceeding. 387 U.S., at 50-51. The Court of Appeals also attempted to justify the preponderance standard on the related ground that juvenile proceedings are designed 'not to punish, but to save the child.' . . . Again, however, *Gault* expressly rejected this justification. 387 U.S., at 27. We made clear in that decision that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for '[a] proceeding where the issue is whether a child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.'" *Winship*, 397 U.S., at 365-66 (some internal citations omitted).

burden of proof in this way is constitutionally permissible only because the first proceeding provides a reliable basis for the conclusion that the attorney is in fact guilty of some wrongdoing warranting punishment -- whether that basis is in the form of an adjudication, an admission, a finding of fact, or evidence. If the original proceeding does not provide a reasonably reliable basis for concluding that the attorney is in fact guilty of wrongdoing warranting punishment, however, there is no constitutionally permissible basis for reversing the usual burden of proof for establishing that a person is guilty of criminal conduct. More fundamentally, imposing "reciprocal" discipline in such circumstances results in punishment *without consideration of guilt or innocence by any tribunal* and without putting the government to its proof, contrary to the core requirements of procedural due process. See *Pearson*, 628 A.2d at 99; *Williams*, 464 A.2d at 118-19.

The Florida resignation procedure provides *no basis* for believing Ms. Day is guilty of *any* misconduct -- much less that she is guilty of the most serious conduct under investigation at the time she resigned, namely, misappropriation of client funds or simple theft. Under Florida law, resignation from the Bar pending an investigation of allegations of professional misconduct does not require or result in an adjudication of guilt, findings of fact, or any admission of wrongdoing.[5] Having found that permitting Ms. Day to forgo the ordeal of formal disciplinary proceedings was in the public interest, the Supreme Court of Florida concluded its proceedings. App., 56a. Upon entry of the Court's order permitting Ms. Day to resign, Florida Bar

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[5] Upon finding that "the public interest will not be adversely affected by the granting of the petition [to resign pending a disciplinary investigation] and that [granting the petition] will not adversely affect the purity of the courts nor hinder the administration of justice, nor the confidence of the public in the legal profession, the Supreme Court of Florida shall enter an appropriate judgment granting leave to resign." Florida Bar Rule 3-7.11(b), renumbered as Rule 3-7.12, *Florida Bar*, 558 So.2d 1008, 1010-11(Fla. 1990).

Counsel simply terminated his investigation. See Florida Bar Rule 3-7.11(d). Under the circumstances of this case, therefore, Ms. Day's 1988 resignation under the Florida procedure cannot support disbarment in the District of Columbia as "reciprocal discipline."

Ms. Day has never even been formally charged with a specific offense either in Florida or in the District of Columbia. Nor has she had any opportunity to hear and respond to any evidence of any alleged professional misconduct, but she was disbarred in the District of Columbia more than two years ago. Citing its decision in *In re Richardson*, 692 A.2d 427, 433-35 (D.C. 1997), *cert. denied*, 118 S.Ct. 1056 (1998), the court of appeals erroneously concluded that by resigning from the Florida Bar Ms. Day had "waived her right to a hearing there -- and here -- on the underlying charge of misconduct." App.,7a. Ms. Day did not "waive" her right to procedural due process in Florida or in the District of Columbia.

In contrast to a plea of guilty or *nolo contendere* to a criminal charge or consent to disbarment under the rules in many jurisdictions, the Florida resignation procedure does not result in any state-imposed sanction or adjudication. Although prompted by a disciplinary investigation, resignation under the Florida procedure is voluntary, and not punishment imposed by the state. Consequently, none of the protections afforded by the Due Process Clause is applicable to a resignation under the Florida rules. No notice of specific, formal charges (as opposed to the allegations being investigated), no presentation of evidence by the government, and no hearing at which an attorney would have an opportunity to respond are required. Since no hearing was required under the Florida resignation procedure, Ms. Day had no occasion to waive any right to a hearing there.

The court of appeals' assertion that by resigning in Florida Ms. Day "waived" her right to a fair hearing in the District of Columbia on the underlying charges is wrong for another reason. Under the plain language of the rules of the District of Columbia and the rules of most other jurisdictions, *only* a

"final determination by a disciplining court ... that an attorney has been guilty of professional misconduct shall conclusively establish the misconduct for purpose of a reciprocal disciplinary proceeding." D.C. Bar Rule XI, § 11(c).[6] No

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[6] Most jurisdictions have adopted disciplinary rules based on the ABA model rules. *Model Rules for Lawyer Disciplinary Enforcement* ("MRLDE")(1993); *Model Rules for Lawyer Disciplinary Enforcement* (1989); *Standards for Lawyer Discipline and Disability Proceedings* (1979). *See Developments in the Law: Lawyers' Responsibilities and Lawyers' Responses*, 107 Harv. L. Rev. 1547, 1597 n.114 (1994). MRLDE, Rule 22 is as follows:

> D. **Discipline to be Imposed**. Upon the expiration of [thirty] days from service of the notice pursuant to the provisions of paragraph B, this court shall impose the identical discipline . . . unless disciplinary counsel or the lawyer demonstrates, or this court finds that it clearly appears upon the face of the record from which the discipline is predicated, that:
>
> (1) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or
>
> (3) The imposition of the same discipline by the court would result in grave injustice; or
>
> (4) The misconduct established warrants substantially different discipline in this state;
>
> . . . . .
>
> If this court determines that any of those elements exists, this court shall enter such other order as it deems appropriate. The burden is on the party seeking different discipline in this jurisdiction to demonstrate that the imposition of the same discipline is not appropriate.
>
> E. **Conclusiveness of Adjudication in Other Jurisdiction.** In all other aspects, a final adjudication in another jurisdiction that a lawyer has been guilty of misconduct . . . shall establish conclusively the misconduct . . . for purposes of a disciplinary . . . proceeding in this state.

Florida court has determined that Ms. Day was guilty of misappropriation or any other conduct warranting disbarment. Indeed, no Florida court has even considered evidence of whether Ms. Day was guilty of misappropriation or other conduct warranting disbarment. Reciprocal disbarment in the District of Columbia under these circumstances violates the core command of the Due Process Clause.

B. Disbarment Without Notice of the Charges That Must Be Answered Violates Due Process.

Disbarment in this case conflicts with the holding of the Court in *In re Ruffalo*, 390 U.S. 544 (1968). In *Ruffalo* the Court held that a lawyer charged with one set of offenses could not be disbarred for a new offense added after the lawyer had answered the initial charges. The lawyer in *Ruffalo* was charged with improper solicitation of clients through an agent. The lawyer admitted employing the agent, but explained that the agent had been employed to help investigate cases, not solicit new cases. After the agent testified that he was employed by the Baltimore & Ohio Railroad ("B&O") and that some of the cases he investigated involved the B&O, the disciplinary authorities added a new charge, namely, that the lawyer should be disbarred because it was improper to hire an employee of the railroad to investigate cases in which the railroad was a potential defendant. The lawyer was disbarred on the new charge. This Court explained that the Due Process Clause requires timely notice of the specific charges a lawyer must meet and a fair opportunity to be heard on those charges: "The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused." 390 U.S., at 551.

ABA/BNA *Lawyers Manual on Professional Conduct* 01:601, 01:622 (1999)

Throughout this proceeding, Bar Counsel for the District of Columbia asserted that Ms. Day should be disbarred because she resigned while she was being investigated in Florida for misappropriation, criminal conduct that would have warranted disbarment in the District of Columbia.[7] District of Columbia Bar Counsel never suggested that there was anything else under investigation in Florida in 1988 that would have warranted Ms. Day's disbarment in the District of Columbia. Ms. Day completely answered the misappropriation claim. Indeed, the court of appeals repeatedly acknowledges that Ms. Day's former husband stole the money from the client escrow accounts. See App.,12a ("Day was responsible for running her law practice in a manner that protected her office systems, including her client trust account, from *her husband's misuse*") (emphasis added); *id.* at 10a-11a ("we are not persuaded that Day's proffered 'uncontested evidence' promises to show, by clear and convincing evidence, an infirmity of proof that Day was responsible for *her husband's misappropriation* of funds from her client escrow account") (emphasis added).

Ms. Day was disbarred in the District of Columbia, however, because the evidence she submitted to show she had not misappropriated client funds did not also show she had done everything she should have to prevent her former husband from stealing from her clients. According to the court of appeals (App., 14a):

> The Board reviewed the record that does exist, including the one that Day has created in this jurisdiction, to determine whether it supported a finding of misappropriation resulting from simple negligence which would justify a lesser sanction

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[7] *See, e.g.*, Statement of Bar Counsel Before the Board at 1-2, 7 (Dec. 16, 1996); Brief of Bar Counsel in Support of Report and Recommendation of the Board of Professional Responsibility at 2, 5 (July, 1997).

> than disbarment, but concluded that it did not. We agree. Day admits that client funds were misused but . . . has proffered no evidence that would support a claim that her husband's ability to access her account, particularly when viewed in the context of her knowledge of his [past] illegal activities, was the result of simple negligence on her part.

Using Ms. Day's response to the charge of misappropriation to disbar her for the fundamentally different offense of failing to prevent someone else's theft denied Ms. Day the benefit of the "first and most universally recognized requirement of due process," namely "notice of the true nature of the charge" to which she was required to respond. *Bousley* v. *United States*, 118 S.Ct. 1604, 1609 (1998), quoting *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941); see *Ruffalo*, 390 U.S., at 550.

The first suggestion that Ms. Day should be disbarred in the District of Columbia because she failed to prevent her husband's theft was the Board's decision recommending disbarment. See App., 39a-42a. In her opening brief in the court of appeals (at 25) and in her reply brief as well (at 8), Ms. Day explicitly offered to travel to the District of Columbia from her home in Florida to appear before the Board to respond to questions raised about the evidence she had submitted. Inexplicably, the court of appeals rejected Ms. Day's offer and denied her any opportunity to meet the new claim before the Board, criticizing her failure to submit a "proffer" of additional evidence in the court of appeals addressing the details of her former husband's theft.[8]

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[8] *See* App. 12a ("Bohn's affidavit is conclusory and does not contain any factual recitation regarding the exact nature of his actions. Specifically, neither affidavit addresses basic issues such as the amount of funds Bohn removed, the methods he used to effect the theft, and the systems that Day employed to ensure the integrity of her client funds. Despite these deficiencies in her proof noted in the Board report, Day has not proffered to supplement the record to address the Board's concerns. The Board released its report on May 14, 1997, and Day filed her exceptions

Appellate courts seldom consider new evidence and almost never reverse a lower court or administrative tribunal on the strength of evidence not presented below. See, *e.g.*, Robert L. Stern et al., *Supreme Court Practice* 555 (7th ed. 1993). Ms. Day's failure to "proffer" additional evidence that the court of appeals was unlikely to consider cannot reasonably be used to deny her any opportunity to respond to the questions raised by the Board in further proceedings before the Board in the first instance.

At a minimum, Ms. Day was entitled to a full and fair opportunity to respond to a specific statement of the conduct for which she was to be reciprocally disbarred in the District of Columbia at some point in the proceeding before she was disbarred. In *Ruffalo* this Court held that disbarment on the basis of a charge added after the proceedings began violated the requirements of Due Process, even though the proceedings were interrupted for several months to give the lawyer an opportunity to respond to the new charge. 390 U.S., at 551 n.4. Ms. Day was denied even this minimal procedural right to respond to the new, unanticipated, and unprecedented charge based entirely on her response to the initial claims.

C. The Reciprocal Discipline Procedures of The District of Columbia Court of Appeals Provide No Opportunity For A Meaningful Hearing.

"Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred." *Theard v. United States*, 354 U.S., at 282. The exceptions to reciprocal discipline recognized in the ABA Model Rules (note 6, *supra*) and in the rules of the District of Columbia Bar are derived from the decision in *Selling v. Radford*, 243 U.S., at 51, in which this Court described the procedure it considered appropriate for determining whether an attorney disbarred by

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approximately one month later, and her reply brief six weeks thereafter, giving her at least two opportunities to provide a more detailed proffer").

a State court should remain a member of the Bar of this Court. A State court finding that an attorney was guilty of some misconduct, though not binding, would be accepted by this Court as sufficient to establish the fact of the misconduct unless (1) "the state procedure from want of notice or opportunity to be heard was wanting in due process"; (2) "there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject"; or (3) "some other grave reason existed which should convince us that to allow the natural consequences of the [State court] judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do." *Id.* The central consideration as to whether an attorney should be punished by disbarment must be the nature of the alleged misconduct and the quality of the evidence showing that the attorney is in fact guilty of the alleged misconduct. See *Id.* at 48-9 ("the character and scope of the investigation to be made on a prayer for disbarment, before sanction is given to it, must depend upon the character of the acts of misconduct and wrong relied upon, of the place of their commission and the nature of the proof relied upon to establish their existence").

Properly construed, the exceptions to reciprocal discipline stated in Rule XI, § 11(c) of the Rules governing the District of Columbia Bar, like those of most other jurisdictions, afford "ample opportunity" for an attorney to be heard as to why reciprocal discipline should not be imposed, including, for example, innocence of the alleged wrongdoing or the existence of mitigating circumstances, notwithstanding any prior discipline. See *Theard*, 354 U.S., at 282-83; *Selling*, 243 U.S., at 50-52. As construed by the court of appeals in this case, however, the exceptions to reciprocal discipline are so limited they afford no meaningful opportunity to be heard on the issues that should matter most. Under the

interpretation of the rules adopted by the court of appeals, innocence is all but irrelevant.

Before the Board, Ms. Day submitted her own affidavit as well as that of her former husband, the only other person who had any personal knowledge of the facts surrounding the theft, to demonstrate that, like her clients, she was a victim of her former husband's theft and was not complicit in his wrongdoing. There is no evidence to the contrary, but the court of appeals concluded that Ms. Day should be disbarred because it was not persuaded that the evidence showed: (1) that disbarment would be a "grave injustice," D.C. Bar Rule XI, § 11(c)(3); (2) that there was such an infirmity of proof the Florida Court's order granting Ms. Day's petition for leave to resign could not be accepted as a final determination that she was guilty of misappropriation, D.C. Bar Rule XI, § 11(c)(2); or (3) that any "misconduct established warrants substantially different discipline in the District of Columbia," D.C. Rule XI, § 11(c)(4). As authoritatively construed by the court of appeals in this case, the exceptions to reciprocal discipline are utterly meaningless. Ms. Day was denied any meaningful opportunity to show that reciprocal discipline was unwarranted in this case.

First, Rule XI, § 11(c)(3) has no meaning, if uncontested evidence that an attorney is innocent of the only conduct alleged that could warrant disbarment does not show that imposing disbarment as reciprocal discipline would be a "grave injustice." Second, Rule XI, § 11(c)(2) has no meaning, if the absence of *any evidence, findings of fact, or adjudication of wrongdoing that would warrant disbarment* is not an "infirmity of proof" sufficient to show that the order permitting Ms. Day to resign from the Florida Bar should not be deemed conclusive of the question of whether she was guilty of conduct warranting disbarment. Third, as construed by the court of appeals in this case, Rule XI, § 11(c)(4) is meaningless as well. On the record before the court of appeals, the only "misconduct established," if it can be called "misconduct" at all, is that Ms. Day did not, as a matter of

fact, prevent her former husband from stealing from her client escrow account. The Board, the court of appeals, and District of Columbia Bar Counsel have failed to identify another case in which a lawyer was disbarred under the Code of Responsibility in effect in the District of Columbia in 1988 for failure to prevent intentional wrongdoing by another. Yet, the court of appeals concluded that Ms. Day should be disbarred because she had not shown that *her husband's theft* "was the result of simple negligence on her part." Without any evidentiary basis at all, the court of appeals simply assumed that a "misappropriation" warranting Ms. Day's disbarment (as opposed to a theft by a third person) had been "established" for purposes of Rule XI, § 11(c)(4), and disbarred Ms. Day as if she were in fact guilty of such a misappropriation. See App., 14a.

The court of appeals did not dispute the complete absence of any evidence of wrongdoing by Ms. Day, but blamed Ms. Day for the inadequacy of the record. According to the court of appeals, because Ms. Day resigned, "there does not exist proof of record establishing the misconduct with which she was charged," App. 10a, and she should be "estopped from arguing in these proceedings that there was an infirmity of proof that should serve as the basis for avoiding reciprocal discipline here." *Id.* The Florida resignation procedure reflects the considered judgment of the Florida Supreme Court that permitting a lawyer to resign in lieu of formal disciplinary proceedings is preferable to procedural alternatives that might establish a record sufficient to support reciprocal discipline in other jurisdictions, but which might well be more expensive and less effective in resolving allegations of professional misconduct in Florida. Penalizing Ms. Day for exercising a procedural option offered by the Florida Supreme Court undermines the policy choice of Florida, without advancing any legitimate interest of the District of Columbia. The absence of evidence of

wrongdoing in the record is compelling reason for not invoking reciprocal discipline; it is no reason for disbarment.[9]

The right to a hearing promised by the exceptions to reciprocal discipline stated in Rule XI, § 11(c) of the Rules Governing the D.C. Bar is illusory, if evidence that an attorney is not guilty of the alleged misconduct cannot be considered under the circumstances of this case. Evidence of innocence cannot be irrelevant when there is no evidence of guilt.

II. RECIPROCAL DISCIPLINE IS AN IMPORTANT COMPONENT OF THE SYSTEM OF ATTORNEY DISCIPLINE THROUGHOUT THE UNITED STATES.

Reciprocal discipline is an important component of the system of attorney discipline in the United States. First, the significant number of lawyers exposed to the disciplinary jurisdiction of more than one court is growing. Second,

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[9] The court of appeals also criticized Ms. Day's failure to report her resignation from the Florida Bar to District of Columbia Bar Counsel as a violation of her duty to report discipline under Rule XI, § 11(b), which prevented him from conducting an investigation of her conduct near the time of the events. *See* App. 4a, 10a & n.6, 13a. The court of appeals excused District of Columbia Bar Counsel's apparent violation of the same rule or overlooked the first sentence of Rule XI, § 11(b): "*It shall be the duty of Bar Counsel to obtain copies of all orders of discipline from other disciplining courts*" (emphasis added). The court of appeals only recently held that resignation pending a disciplinary investigation under the 1988 Florida rules is "discipline." *Richardson*, 692 A.2d at 430-32. Ms. Day did not anticipate *Richardson* on this point and, consequently, did not report her resignation from the Florida Bar to District of Columbia Bar Counsel. No one should be faulted for a failure to anticipate the ruling in *Richardson* by nine years, but if, unlike Ms. Day, Bar Counsel anticipated the ruling in *Richardson* and regarded voluntary resignation under the Florida procedure as "discipline," he failed to comply with his obligations under Rule XI, § 11(b) to the same extent as Ms. Day. In other words, Ms. Day is not solely responsible for Bar Counsel's failure to investigate the allegations against her closer to the time of the events and she should not bear the entire burden of that failure.

reciprocal discipline procedures are nearly universal in state and federal courts across the country. Third, if the District of Columbia is representative, reciprocal discipline cases may be a significant percentage of all disciplinary decisions. Guidance as to the permissible standards for invoking these procedures therefore is important to proper administration of this system of attorney discipline.

Literally tens of thousands of lawyers across the country are subject to the jurisdiction of more than one state or federal court. Nearly all litigators are likely to be members of the Bar of both the highest court in the State and the federal district court and court of appeals for the jurisdiction in which they reside. Like others in the United States, moreover, lawyers are becoming increasingly mobile. See M. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice: Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. Tex. L. Rev. 717, 723- 42 & nn. 18-98 (1995) (describing the forces contributing to the increasing numbers of lawyers who are admitted to practice in the courts of more than one state or who are otherwise subject to the disciplinary jurisdiction of more than one state). There is little empirical data on the number of dual-licensed lawyers or lawyers who do not live in the state of licensure. See *id.*, 36 S. Tex. L. Rev. at 726 n. 23. Nonetheless, as the needs of clients increasingly extend across State lines, the practices of the lawyers who serve them -- in-house counsel and outside counsel, litigators and transactional lawyers -- have expanded across State lines as well.

As noted, like the District of Columbia, most other jurisdictions have adopted attorney discipline procedures based on the American Bar Association model rules. See note 6, *supra*. These rules include reciprocal discipline procedures similar to those of the District of Columbia, and authorize reciprocal discipline unless an attorney shows that one of the recognized exceptions to reciprocal discipline is applicable. Many federal courts also have similar rules.

See, *e.g.*, *Theard*, 354 U.S., at 281-82 (1957); *In re Hoare*, 155 F.3d 937 (8th Cir. 1997)(rules of the United States District Court of the Eastern District of Missouri); see generally ABA, Model Federal Rules of Disciplinary Enforcement, Rule III, , *reprinted in*, ABA/BNA *Lawyers Manual on Professional Conduct* 01:701, 01:703 (1999).[10]

Reciprocal discipline clearly plays an important role in the system of attorney discipline in the courts of this country. See note 3, *supra*. If the District of Columbia is at all representative, reciprocal discipline decisions may constitute as much as one-half of the courts' disciplinary decisions. The District of Columbia Bar is one of the largest in the country; as of July, 1998, there were 69,157 active, inactive, judicial, and retired members of the District of Columbia Bar.[11] Approximately 70% of the total membership of the District of Columbia Bar, however, has a preferred mailing address outside the District of Columbia. Moreover, of the 45,913 active members of the District of Columbia Bar, 12,535 (27.3%) have mailing addresses outside the metropolitan area

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[10] Rule III of the ABA Model Federal Rules of Disciplinary Enforcement specifically purports to authorize automatic disbarment from a federal court upon resignation pending an investigation of allegations of misconduct: "Any attorney admitted to practice before this Court who shall be disbarred on consent or resign from the bar of any other Court of the United States or the District of Columbia, or from the Bar of any state, territory, commonwealth or possession of the United States while an investigation into allegations of misconduct is pending, shall, upon the filing with this Court of a certified or exemplified copy of the judgment or order accepting such disbarment on consent or resignation, cease to be permitted to practice before this Court and be stricken from the roll of attorneys admitted to practice before this Court." ABA/BNA *Lawyers Manual on Professional Conduct* 01:703 (1999).

[11] Data on District of Columbia Bar membership are taken from a letter to counsel for petitioner from C.E. Lorenzetti, Assistant Executive Director, Administration and Finance, District of Columbia Bar. Twelve copies of the letter are bejng lodged with the Clerk of this Court simultaneous with the filing of the petition.

(*i.e.*, the District of Columbia, Maryland, and Virginia). Many of these active members are likely to members of other State Bars. Moreover, many of the remaining 33,378 active members of the District of Columbia Bar are also members of either the Maryland Bar or the Virginia Bar or both.[12]

A significant percentage of the disciplinary decisions of the District of Columbia Court of Appeals involve reciprocal discipline. For example, in 1998, 56% (13 of 23) of the published disciplinary decisions of the court of appeals, including the decision in this case, involved reciprocal discipline.[13] Similarly in the first three and one-half months of this year, through April 11, 1999, 54% (12 of 22) of the published disciplinary decisions of the court of appeals involved reciprocal discipline.[14]

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[12] Although the numbers are almost certainly understated due to under reporting, the records of the Bar indicate that 37,106 of the Bar's 47,854 active members today are members of the Bar of another jurisdiction.

[13] **Reciprocal Discipline Cases**: *In re Williams*, 722 A.2d 331 (D.C. 1998); *In re Steinberg*, 720 A.2d 900 (D.C. 1998); *In re Bendet*, 719 A.2d 1243 (D.C. 1998); *In re Hollis*, 719 A.2d 965 (D.C. 1998); *In re Gilbert*, 719 A.2d 95 (D.C. 1998); *In re Day*, 717 A.2d 883 (D.C. 1998); *In re Willingham*, 717 A.2d 342 (D.C. 1998); *In re Bell*, 716 A.2d 205 (1998); *In re Lyles*, 714 A.2d 120 (D.C. 1998); *In re Spann*, 711 A.2d 1262 (D.C. 1998); *In re Reynolds*, 707 A.2d 791 (D.C. 1998); *In re Roxborough*, 707 A.2d 57 (D.C. 1998); *In re Gentile*, 706 A.2d 27 (D.C. 1998). **Non-reciprocal Discipline Cases**: *In re Shelnutt*, 719 A.2d 96 (D.C. 1998) (original); *In re Deering*, 715 A.2d 138 (D.C. 1998) (original and reciprocal); *In re Bland*, 714 A.2d 787 (D.C. 1998) (original); *In re Banks*, 709 A.2d 1181 (D.C. 1998) (original); *In re Brown*, 709 A.2d 724 (D.C. 1998) (original); *In re Bernstein*, 707 A.2d 371 (D.C. 1998) (original); *In re Clyman*, 713 A.2d 313 (D.C. 1998)(reinstatement); *In re Lee*, 706 A.2d 1032 (D.C. 1998)(reinstatement); *In re Robinson*, 705 A.2d 687 (D.C. 1998) (reinstatement).

[14] ***Reciprocal Discipline Cases***: *In re Rivera*, 199 D.C. App. LEXIS 74 (Apr. 1, 1999); *In re Glasco*, 1999 D.C. App. LEXIS 69 (Mar. 25, 1999); *In re Sealy*, 1999 D.C. App. 57 (Mar. 18, 1999); *In re George*, 1999 D.C. App. LEXIS 58 (Mar. 18, 1999); *In re Van*, 1999 D.C. App. LEXIS 59 (Mar. 18, 1999); *In re Massey*, 1999 D.C. App. LEXIS 62 (Mar. 18, 1999); *In re Lillard*, 1999 D.C. App. LEXIS 35 (Feb. 25, 1999); *In re*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to review the judgment of the court of appeals in this case should be granted.

Respectfully submitted,

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April 19, 1999

Oak, 1999 D.C. App. LEXIS 38 (Feb. 25, 1999); *In re Piatt*, 1999 D.C. App. LEXIS 42 (Feb. 25, 1999); *In re Klein*, 723 A.2d 864 (D.C. 1999); *In re Collins*, 723 A.2d 1213 (D.C. 1999); *In re. Scanlan*, 1999 D.C. App. LEXIS 2 (Jan. 7, 1999). **Non-Reciprocal Discipline Cases**: *In re Hoare*, 1999 D.C. App. LEXIS 65 (Mar. 18, 1999) (conviction of reckless homicide); *In re Sweeney*, 1999 D.C. App. LEXIS 55 (Mar. 11, 1999) (conviction for false statements in connection with ERISA); *In re Levitt*, 1999 D.C. App. LEXIS 40 (Feb. 25, 1999) (conviction for failure to file tax returns); *In re Duker*, 723 A.2d 410 (D.C. 1999) (conviction for mail fraud); *In re Neill*, 722 A.2d 849 (D.C. 1999) (consent to disbarment); *In re Pullings*, 1999 D.C. App. LEXIS 24 (Feb. 11 1999) (original disciplinary proceeding); *In re Mitchell*, 1999 D.C. App. LEXIS 60 (Mar. 18, 1999) (original disciplinary proceeding); *In re Jamison*, 1999 D.C. App. LEXIS 73 (Apr. 1, 1999) (reinstatement); *In re Molovinsky*, 723 A.2d 406 (D.C. 1999) (reinstatement).

In re Karen S. DAY, Respondent.

A Member of the Bar of the District of Columbia Court of Appeals.

No. 96-BG-1244.

District of Columbia Court of Appeals.

Argued Dec. 2, 1997.
Decided Sept. 10, 1998.

George W. Jones, Washington, DC, for Respondent.

Michael S. Frisch, Assistant Bar Counsel, with whom Leonard H. Becker, Bar Counsel, was on the brief, for the Office of Bar Counsel.

Before STEADMAN, RUIZ and REID, Associate Judges.

RUIZ, Associate Judge:

In 1988, the Florida Bar initiated an investigation of Respondent, Karen S. Day, for misappropriation of client trust account funds. Day resigned from the Florida Bar without leave to seek reinstatement before the investigation was completed. Day takes exception to the Report and Recommendation of the Board on Professional Responsibility (the "Board"), which recommends that this court disbar Day from practice in the District of Columbia as reciprocal discipline for conduct that caused her to voluntarily resign from the Florida Bar. Bar Counsel agrees with the Board's recommendation.

Taking exception to the Board's recommendation, Day argues that disbarment is not warranted in this case because at least three of the five exceptions to mandatory reciprocal discipline, under D.C.Bar Rule XI, § 11(c), apply to her case. Specifically, she claims that there is no evidence of any

wrongdoing that would have warranted disbarment under the Code of Professional Responsibility in effect in this jurisdiction in 1988. In this regard, Day places great significance on the distinct Florida disciplinary rules that do not require an admission of wrongdoing as a condition of voluntary resignation. We conclude that because Day's resignation from the Florida Bar while a disciplinary proceeding was pending against her constituted "discipline," and none of the exceptions to reciprocal discipline apply to her case, the Rules of the District of Columbia Bar require the imposition of reciprocal discipline. We also conclude that Day's due process rights are not violated by the imposition of reciprocal discipline.

I.

Day was admitted to the Bar of the District of Columbia Court of Appeals, upon examination, on December 18, 1981. In 1982, she moved to Florida to be closer to her family. She was admitted to the Bar of the Supreme Court of Florida, upon examination, on November 29, 1982.

Starting in 1985, Day experienced a number of setbacks and adversity in her personal life.[1] She also began to have

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[1] In September of 1985, a state agency accused Day's husband's process server business of submitting fraudulent affidavits of service falsely attesting that documents had been served. At that time, Day for the first time learned of her husband's unsavory past from newspaper stories, which disclosed that he had been convicted in 1963 for tampering with the mail, and had served fourteen months in a federal prison. He also had been convicted of passing forged documents in Fort Lauderdale, Florida, and sentenced to four years' probation in 1974. Day also learned that Thomas Sherman Bohn, as she knew her husband, was not her husband's real name, but that he had fraudulently assumed his present identity.

In October, 1985, Bohn testified in a criminal trial on behalf of a defendant charged and convicted of racketeering, fraud, grand theft, and sale of unregistered securities, a scheme where investors lost about $1.7 million. In December of that year, her husband was charged with perjury in connection with this testimony. At that time, Day was seven months pregnant with her second child, who was born in February 1986, with a

problems in her professional life. On March 3, 1988, the Supreme Court of Florida publicly reprimanded Day for professional misconduct because she "notarized numerous affidavits without requiring the affiants to personally appear before her." During this time, while undergoing a number of personal difficulties, Day discovered that money was missing from her client escrow account when checks written on the account were returned for insufficient funds. Her husband admitted to her that he had stolen money from the escrow account. The Florida Bar instituted a disciplinary investigation of the missing funds. According to Day, her husband pressured her not to testify against him. She explains that instead of fighting to "clear her name and save her career," she chose to resign because she "could not endure the ordeal of testifying against the father of my children in formal disciplinary proceedings."

On July 2, 1988, Day filed a Petition for Leave to Resign in the Supreme Court of the State of Florida. The Florida Bar opposed the petition on a number of grounds, including the pending disciplinary investigation for trust account violations and misappropriation, her failure to cooperate with the investigation and because she did not specify a period of resignation.

On September 22, 1988, Day filed an Amended Petition for Leave to Resign pursuant to Florida Bar Rule 3-7.11 with the Supreme Court of Florida seeking leave to resign permanently, without leave to reapply. In her Amended Petition, Day noted her previous public reprimand, and acknowledged the pendency of a Florida disciplinary investigation for failure to properly maintain trust accounts. On November 17, 1988, the Supreme Court of Florida approved Day's amended petition effective December 19,

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heart condition. A year later, in March 1987, her husband was convicted of the perjury charge. In June 1987, her youngest child had to be hospitalized because she developed pneumonia. In June 1988, her husband was sentenced to six months' imprisonment.

1988. Since May 1995, Day has established a practice limited to federal immigration matters. Day's limited legal practice is purportedly authorized by her D.C.Bar license as indicated in her business card: "Admitted to Washington, D.C. Bar only, practice limited to Immigration and International Law."

Day failed to report the action of the Florida Supreme Court accepting her permanent resignation to the District of Columbia Bar. This jurisdiction did not learn of Day's resignation in Florida until May 1996, when the Florida Bar authorities brought it to Bar Counsel's attention. Upon being advised of Day's permanent disbarment in Florida, this court entered an order suspending Day from the practice of law in the District of Columbia on November 21, 1996, and directing Bar Counsel to inform the Board of his position regarding reciprocal discipline.[2]

II.

A threshold issue in this case is whether resignation under Rule 3-7.11 of the Florida Bar Rules constitutes "discipline" for the purpose of reciprocal discipline in this jurisdiction. The issue was recently decided by this court in the case of *In re Richardson*, 692 A.2d 427 (D.C.1997), *cert. denied*, __ U.S., __, 118 S.Ct. 1056, 140 L.Ed.2d 118 (1998). There, this court determined that resignation under Rule 3-7.11 was discipline for the purposes of Rule XI, § 11.[3] *Id.* at

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[2] On May 29, 1997, this court denied Day's Petition for Rehearing or Rehearing En Banc regarding the interim suspension order.

[3] In 1988, the Florida Rules provided a procedure for an attorney to resign when she is not facing a disciplinary or criminal investigation, Florida Rule 1-3.4, and a procedure allowing an attorney to resign in the face of a disciplinary investigation, Florida Rule 3-7.11. Florida Rule 3-7.11 was amended in 1993; the actual content of the rule was not modified but it was renumbered as 3-7.12 and retitled as "Disciplinary Resignation from the Florida Bar." Rule 3-5.1, which specified the various types of discipline also was amended to include new subsection (j) "Disciplinary Resignation" which refers to the procedure authorized by Rule 3-7.12 and

428. Richardson made an identical claim to the one Day presents here, relying on the fact that his resignation was voluntary and that neither the Florida Bar nor the Florida Supreme Court "found him guilty of any misconduct." *Id.* at 430-31. While recognizing that "when disciplinary proceedings have been initiated, Florida does not require the respondent attorney to admit the charges as a condition of the attorney's resignation from the bar," this court concluded "that the Supreme Court of Florida's acceptance of Richardson's resignation while a disciplinary proceeding was pending against him constituted 'discipline' both in Florida and under our Rule XI § 11." *Id* at 431. Similarly in this case, the Florida Supreme Court's acceptance of Day's permanent resignation in the face of a pending disciplinary proceeding was "discipline" upon which we may impose reciprocal discipline under Rule XI, § 11.

III. Due Process

Day contends that reciprocal disbarment would violate her right to due process of law because there has been no adjudication of guilt and the uncontested evidence she has presented demonstrates no wrongdoing on her part. Bar Counsel replies that Day received from the Florida disciplinary proceedings all the process she was due there, and that she knowingly waived her right to a hearing. Having done so, she cannot now complain that she is subject to the collateral consequences of her choice.

An attorney has a right to procedural due process in a disciplinary procedure. *See In re Ruffalo*, 390 U.S. 544, 550, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); *see also In re Richardson*, 692 A.2d 427, 433 (1997); *In re Colson*, 412 A.2d 1160, 1164 (D.C.1979) (en banc). Due process is afforded when the disciplinary proceeding provides adequate notice and a meaningful opportunity to be heard. *See Boddie*

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states that an attorney may be allowed to resign in lieu of defending against allegations of disciplinary violations.

v. Connecticut, 401 U.S. 371, 378-79, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). However, it is well established that an individual can waive any process to which he or she has a right. *See D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972).

In *Richardson*, we addressed and rejected a similar challenge to imposition of reciprocal discipline based on the Florida resignation procedure. Richardson argued that application of Rule XI, § 11 violated his constitutional right to due process by allowing reciprocal discipline upon resignation from the Florida bar, without a hearing in D.C., to determine whether he had knowingly and voluntarily waived his right to a hearing in Florida. He also argued that he did not "receive due process in the District of Columbia because his resignation in Florida resulted in cancellation of the evidentiary hearing on the merits of the charges against him . . . . " *In re Richardson, supra*, 692 A.2d at 434. This court reasoned that

> Richardson's loss of an evidentiary hearing in Florida was his own choice; by electing to resign, he waived his right to a hearing where he could have contested the charges. We also agree that, as a consequence of Richardson's Florida waiver, we are entitled to rely—for purposes of final, reciprocal discipline—on the disciplinary result in Florida, properly certified to this court, without affording Richardson the evidentiary hearing on the Florida charges he elected to forego earlier. Put succinctly: If Richardson validly waived an evidentiary hearing in Florida, he is deemed to have waived any evidentiary hearing on the same charges that would otherwise be required by due process before he could be suspended from the practice of law in this jurisdiction.

Id.

The reasoning in *Richardson* applies with equal force to the case at hand. Day does not contend that she had no notice of the nature of the charges against her in Florida and of the

sanction if she elected to resign in lieu of defending the disciplinary proceeding. Day had a choice as to which disciplinary route she would follow. She could have continued with the disciplinary proceeding or she could have allowed the Supreme Court of Florida to consider her initial petition to resign, over the Florida Bar's objection which could have allowed her to reapply after three years. *See The Florida Bar*, 428 So.2d 662 (Fla.1983) (per curiam). Instead, Day filed an amended petition agreeing to resign without leave to reapply which allowed her to permanently avoid disciplinary proceedings there. However motivated by her difficulties at the time, Day was aware of her options and made her choice of discipline. In her numerous arguments Day ignores the fact that if there was no hearing and formal adjudication in Florida it is because she voluntarily chose to forego that opportunity. As Day knowingly and voluntarily waived her right to any further process in the Florida proceedings, she consequently waived her right to a hearing there—and here—on the underlying charge of misconduct. *See In re Velasquez*, 507 A.2d 145, 147 (D.C.1986) (per curiam) (noting that where "another jurisdiction has already afforded the attorney a disciplinary procedure that includes [all due process safeguards], ... [t]here is no need for a de novo repetition of the entire process," and that "there is merit in the idea of granting due deference—for its sake alone— to the opinions and actions of a sister jurisdiction"). To the extent Day distinguishes her situation from *Richardson* and makes a substantive due process argument because she has proffered evidence of her innocence, D.C.Bar Rule XI, § 11(c) defines her due process rights, which she has exercised in the proceedings before the Board and this court, as explained below.

IV.

Having concluded that disciplinary resignation under the Florida rules is the functional equivalent of discipline, and that there is no due process impediment to the imposition of reciprocal discipline based on Day's Florida resignation, we now turn to the question of whether reciprocal discipline

should be imposed on Day pursuant to D.C.App. Rule XI, § 11(c). The Rule provides that when an attorney is disciplined in another jurisdiction, this court must impose reciprocal discipline unless the attorney shows, by clear and convincing evidence, that one of five enumerated exceptions set forth in § 11(c) applies.[4] *See In re Garner*, 576 A.2d 1356, 1357 (D.C.1990). If the sanction imposed by the initial disciplining court falls within the range of sanctions that might be imposed in an original case in this jurisdiction, identical reciprocal discipline is required. *See id.* The rule "creates a rebuttable presumption that the discipline will be the same in the District of Columbia as it was in the original disciplining

---

[4] D.C.Bar Rule XI, § 11(c) (1997) provides:

> Reciprocal discipline shall be imposed unless the attorney demonstrates, by clear and convincing evidence, that:
>
> (1) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistently with its duty, accept as final the conclusion on that subject; or
>
> (3) The imposition of the same discipline by the Court would result in grave injustice; or
>
> (4) The misconduct established warrants substantially different discipline in the District of Columbia; or
>
> (5) The misconduct elsewhere does not constitute misconduct in the District of Columbia.
>
> Unless there is a finding by the Board under (1), (2) or (5) above, that is accepted by the Court, a final determination by a disciplining court outside the District of Columbia or by another court in the District of Columbia that an attorney has been guilty of professional misconduct shall conclusively establish the misconduct for the purpose of a reciprocal disciplinary proceeding in this court.

jurisdiction." *In re Zilberberg*, 612 A.2d 832, 834 (D.C. 1992). In this case, as the Board and Bar Counsel state, reciprocal discipline would be disbarment.[5]

Day contends that at least three of the § 11(c) exceptions to the imposition of reciprocal discipline apply to her case. Specifically, Day argues that we should not impose reciprocal discipline 1) pursuant to § 11(c)(2), because there is an infirmity of proof establishing the misconduct; 2) pursuant to § 11(c)(3), because imposition of reciprocal discipline would result in "grave injustice"; and 3) pursuant to § 11(c)(4), because any misconduct established warrants substantially different discipline in the District of Columbia. All of Day's arguments center on her contention that the "unusual Florida resignation procedure," in which there was no formal adjudication of her guilt, "makes this case fundamentally different from [other reciprocal discipline cases]."

As we already decided in *Richardson*, Florida's resignation procedure, when undertaken in the face of a disciplinary proceeding, provides a sound basis for reciprocal discipline under Rule XI, § 11. We also held that Rule XI, § 11(c)'s shifting to the attorney the burden to prove an exception to reciprocal discipline by clear and convincing evidence, comports with the Due Process Clause. *See In re Richardson, supra*, 692 A.2d at 435. There is one respect in which the present case differs from *In re Richardson*. There, the court expressly found that Richardson would be entitled to a hearing under Rule XI, § 11(c) by making the required showings, but that Richardson declined the opportunity to do so. *See In re Richardson, supra*, 692 A.2d at 435. In this case, Day expressly avails herself of the opportunity to avoid reciprocal discipline by attempting to make the required showings and requests remand to a Hearing Committee. For the reasons that follow, we conclude that Day's proffered

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[5] Bar Counsel notes that permanent disbarment, the option Day chose in Florida, is not within the range of sanctions in this jurisdiction. *See In re McBride*, 602 A.2d 626, 641 (D.C.1992) (en banc).

showings are insufficient to meet her burden of proof and to entitle her to a hearing.

§ 11(c)(2)—Infirmity of Proof

Day argues that because the Florida resignation procedure did not result in any adjudication of wrongdoing or findings of fact, and did not require any admission of wrongdoing, there is an infirmity of proof establishing the misconduct for which she would be disciplined on a reciprocal basis. This is merely another attack on the imposition of reciprocal discipline based on the Florida resignation procedure, which we have rejected. We further agree with the Board that Day should be estopped from arguing in these proceedings that there was an infirmity of proof that should serve as the basis for avoiding reciprocal discipline here. It was Day's choice to permanently resign from the Florida bar that effectively ended the Florida investigation. As a result, the Florida Bar discarded the files, making investigation of the matter difficult. Furthermore, because Day never reported her resignation in Florida to this jurisdiction as she was required,[6] Bar Counsel did not have the opportunity to investigate her claims in a timely manner and has been severely prejudiced by the delay.

In light of the circumstances of this case, Day may not avoid reciprocal discipline because, as a consequence of the choice she made in Florida, there does not exist proof of record establishing the misconduct with which she was charged. To conclude otherwise would establish a policy hampering enforcement of the rules of professional responsibility. In any event, as further explained below, we are not persuaded that Day's proffered "uncontested evidence" promises to show, by clear and convincing

---

[6] Rule XI, § 11(b) (1997) provides in pertinent part that "any attorney subject to the disciplinary jurisdiction of this Court, upon being subjected to professional disciplinary action by a disciplining court outside the District of Columbia . . . shall promptly inform Bar Counsel of such action."

evidence, an infirmity of proof that Day was responsible for her husband's misappropriation of funds from her client escrow account.

§ 11(c)(3)—Grave Injustice

Day argues that it would be a "grave injustice" to disbar her in a reciprocal proceeding because 1) she has presented evidence that she is not guilty of the alleged misconduct, and 2) there is a fundamental unfairness to invoking reciprocal discipline procedures in a case like this one, where there has been no prior adjudication of guilt. The latter argument we have already addressed. On the matter of her innocence of the charged misconduct, Day relies on the affidavit of Thomas Bohn, her former husband, to support her argument that because the record demonstrates that she was not guilty of any misconduct, she should not be disbarred. Bohn's affidavit makes two statements relevant to this inquiry: 1) "that during the time [Day] was in private practice, I removed funds from her client trust account without her knowledge, consent or authorization," and 2) "that I encouraged her to resign from the Florida Bar rather than to testify against me in any proceeding which may have resulted from my actions." Day also relies on her own affidavit, in which she avers that she was unaware that Bohn was stealing from her client escrow account and that she did not participate in or benefit from the theft.[7]

We think it is significant that the theft from Day's client escrow account occurred after she was aware of her husband's criminal record and the criminal investigation that led to his

---

[7] The extent of Day's explanation in her affidavit is as follows:

> In this same time period, I discovered that money from my client escrow account was missing when checks written on the account were returned for insufficient funds. Bohn admitted to me that he had stolen money from my escrow account. Thomas Bohn's Affidavit is attached hereto as Exhibit D. Until he admitted it, however, I had no idea Bohn was stealing from my client escrow account. I did not participate in any way, and I derived no benefit from Bohn's theft.

perjury conviction. In her affidavit, Day states that she was aware of Bohn's illegal activities well in advance of the misappropriation. She also had firsthand knowledge of the Florida State agency investigation into her husband's business for issuing false affidavits of service. Furthermore, Day herself was under investigation and ultimately disciplined for her involvement in her husband's service of process business, which had forged her name to affidavits of service and misused her notary seal. The Board concluded, and we agree, that in light of all this information, Day was responsible for running her law practice in a manner that protected her office systems, including her client trust account, from her husband's misuse.

We also agree with the Board that Day's and her former husband's affidavits, upon which Day bases her claim of innocence, are insufficient to meet her burden to prove, by clear and convincing evidence, that disbarment would be a "grave injustice." The Board was of the view that the affidavits filed by Day are not "even minimally adequate to demonstrate the existence of this exception." Bohn's affidavit is conclusory and does not contain any factual recitation regarding the exact nature of his actions. Specifically, neither affidavit addresses basic issues such as the amount of funds Bohn removed, the methods he used to effect the theft, and the systems that Day employed to ensure the integrity of her client funds. Despite these deficiencies in her proof noted in the Board report, Day has not proffered to supplement the record to address the Board's concerns. The Board released its report on May 14, 1997, and Day filed her exceptions approximately one month later, and her reply brief six weeks thereafter, giving her at least two opportunities to provide a more detailed proffer.

We are confident that Day's showing is insufficient to warrant a hearing at which she would have to meet her burden of proving, by clear and convincing evidence, that to disbar her would result in a "grave injustice." The two affidavits Day has presented do not provide any detail of the circumstances surrounding the missing trust account funds that would allow the Board to determine whether Day safeguarded her client

trust account. The evidence presented simply is not enough to establish her innocence or even to suggest that she acted in a minimally reasonable manner under the circumstances.

Furthermore, under the exception for "grave injustice" we consider also the possible injustice to the important interests served by the attorney discipline system. Day failed to report the action of the Florida Supreme Court to the District of Columbia Bar, which she had a duty to do. *See* note 6, *supra*. In her affidavit, Day explains that she did not do so because she was not aware of her obligation to report her voluntary resignation from the Florida Bar to this court. We are unpersuaded by this explanation because the Florida procedures make it clear that the kind of resignation Day undertook is akin to discipline. See note 3, *supra*. An attorney is held responsible for knowing the rules of the jurisdiction in which she is admitted to practice.

As a result of Day's failure to inform the court of the Florida action, this jurisdiction belatedly learned of her permanent resignation on May 1996. Bar Counsel persuasively contends that this delay caused serious prejudice to his office because it had no opportunity to investigate the matter close to the time when it first arose. Almost ten years later, there is little Bar Counsel can do to investigate this matter. As we have just reviewed, Day, who is in a better position to provide the necessary information to Bar Counsel, the Board and the court, has offered only a sketchy account. Under the circumstances, Day not only has failed to show that disbarment would be a grave injustice to her, but also cannot disclaim that her omissions have impeded the discipline system of this court.

§ 11(c)(4)—Substantially Different Discipline

This court undertakes a two-step inquiry in determining whether it is appropriate to apply the "substantially different discipline exception" to the presumptive imposition of reciprocal discipline.

> First we determine if the misconduct in question would not have resulted in the same punishment here as it did in the disciplining jurisdiction. Second, where the discipline imposed in this jurisdiction would be different from that of the disciplining court, we must then determine whether the difference is substantial.

In re Garner, supra, 576 A.2d at 1357 (internal citation omitted).

Day argues that the language of D.C.Bar Rule XI, § 11(c)(4) confirms that reciprocal discipline is not appropriate unless a prior determination of wrongdoing, whether based on an admission or on a finding of fact supported by evidence, provides a basis for imposing the same punishment in this jurisdiction. This is the same argument challenging reciprocal discipline based on the Florida resignation procedure, but in a different guise, that we have already rejected.

Before Day opted for disciplinary voluntary resignation in Florida, she was under investigation for misappropriation of funds, conduct that is sanctionable by disbarment in this jurisdiction except in the very limited circumstance of simple negligence. *See In re Pierson*, 690 A.2d 941, 948 (D.C. 1997); *In re Addams*, 579 A.2d 190, 191 (D.C.1990). Day's voluntary resignation stopped the investigation by Florida authorities and precluded the development of a record that could have supported her claim of simple negligence. The Board reviewed the record that does exist, including the one that Day has created in this jurisdiction, to determine whether it supported a finding of misappropriation resulting from simple negligence which would justify a lesser sanction than disbarment, but concluded that it did not. We agree. Day admits that client funds were misused but, as mentioned above, she has proffered no evidence that would support a claim that her husband's ability to access her account, particularly when viewed in the context of her knowledge of his illegal activities, was the result of simple negligence on her part. Indeed, Day's affidavit

suggests the opposite conclusion, that she did not do what she should have to prevent the theft.[8] Thus, Day's showings are insufficient to entitle her to a hearing at which she would have to prove, by clear and convincing evidence, that her misconduct warranted "substantially different discipline" than disbarment.[9]

* * *

We reciprocally impose the discipline Day chose in Florida, disciplinary resignation, which is the equivalent of disbarment. Because permanent disbarment is not within the range of sanctions in this jurisdiction, Day will be eligible for reinstatement in the future, five years from the date of her disbarment here. *See In re White*, 605 A.2d 47, 49 (D.C.1992) (per curiam). Accordingly, we adopt the Board's recommendation and order Day disbarred from the practice of law in the District of Columbia *nunc pro tunc* to December 26, 1996, the date of her filing of the required affidavit under D.C.Bar R. XI, § 14(g), as acknowledged by Bar Counsel at oral argument.

So Ordered.

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[8] In her affidavit, Day states

> 22. With the benefit of hindsight, as well as eight years of maturity, a divorce from Bohn, a new healthy marriage, and a supportive husband, it is clear to me that, given what I had learned about Bohn's past, I should have assumed that he was perfectly capable of stealing from me and my clients. I am not certain of exactly what I could have done to prevent the theft, but perhaps I could have taken steps to make sure Bohn had no access to my client escrow account checkbook. I deeply regret my failure to do so, and for that I take full responsibility.

[9] *In re Evans*, 533 A.2d 243, 244 (D.C.1987), cited by Day, is inapposite In *Evans*, the court concluded that disbarment would create a "gross disparity between sanctions in this case and other cases in which disbarment has been imposed here." *Id.* Evans' misconduct consisted of contumacious conduct in federal court leading to disbarment there, which at that time had never been the subject of Bar discipline, but dealt with thorough contempt proceedings. *See id.* at 244-45. In this case, on the other hand, reciprocal discipline based on misappropriation of client funds is well established and disbarment is the usual sanction.

District of Columbia
Court of Appeals

FILED JAN. 19, 1999

No. 96-BG-1244

IN RE: KAREN S. DAY,

Respondent,

BDN: 211-96

BEFORE: Wagner, Chief Judge; Terry, *Steadman, Schwelb, Farrell, *Ruiz, and *Reid, Associate Judges.

ORDER

On consideration of respondent's petition for rehearing or rehearing en banc, Bar Counsel's response, and respondent's motion for leave to file a reply to Bar Counsel's response and the lodged reply, it is

ORDERED that respondent's motion for leave to file a reply to Bar Counsel's response is granted, and the Clerk is directed to file the lodged reply. It is

FURTHER ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Copies to:

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Patricia A. Brannan, Esquire
Chair
Board on Professional Responsibility
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District of Columbia
Court of Appeals

FILED NOV. 21, 1996

No. 96-BG-1244

In the Matter of
KAREN S. DAY, ESQUIRE
A Member of the Bar of the
District of Columbia
Court of Appeals BDN: 211-96

BEFORE: Steadman and Farrell, Associate Judges, and Belson, Senior Judge.

ORDER

On consideration of Bar Counsel's proposed order of interim suspension of respondent, respondent's opposition thereto, Bar Counsel's response to respondent's opposition, respondent's reply to Bar Counsel's response, and respondent's request for oral argument, and it appearing that the Court has received a certified copy of an order of the Supreme Court of Florida granting respondent leave to resign from the Florida Bar without leave to reapply, it is accordingly, pursuant to Rule XI, § 11 (d) of the Rules Governing the Bar of the District of Columbia,

ORDERED that respondent is suspended from the practice of law in the District of Columbia pending final disposition of this proceeding, and it is

FURTHER ORDERED that Bar counsel inform the Board on Professional Responsibility of his position regarding reciprocal discipline within 30 days of the date of this order. Thereafter, respondent shall show cause before the Board on Professional Responsibility, if cause there be, within 10 days

why identical, greater or lesser discipline should not be imposed in the District of Columbia. It is

FURTHER ORDERED that the Board on Professional Responsibility is directed to recommend promptly thereafter to this Court whether identical, greater or lesser discipline should be imposed as reciprocal discipline or whether the Board, instead, elects to proceed de novo pursuant to Rule XI, § 11. It is

FURTHER ORDERED that respondent's attention is drawn to the requirement of D.C. Bar Rule XI, § 14 relating to suspended attorneys and to the provisions of § 16 (c) dealing with the timing of eligibility for reinstatement as related to compliance with § 14, including the filing of the required affidavit. It is

FURTHER ORDERED that the Clerk shall cause a copy of this order and the order of the Supreme Court of Florida to be directed to the Chair of the Board on Professional Responsibility and transmitted to respondent. It is

FURTHER ORDERED that Bar Counsel advise the Court if the matter is concluded without the necessity of further Court action. It is

FURTHER ORDERED that respondent's request for oral argument is denied.

PER CURIAM

Copies to:

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A true Copy
Test:

Garland Pinkston, Jr.
Clerk of the District of Columbia Court of Appeals

*By /s/*_____
DEPUTY CLERK

District of Columbia
Court of Appeals

DEC. 19, 1996

No. 96-BG-1244

In the Matter of
KAREN S. DAY, ESQUIRE
A Member of the Bar of the
District of Columbia
Court of Appeals

BDN: 211-96

BEFORE: Steadman and Farrell, Associate Judges; and Belson, Senior Judge.

ORDER

On consideration of respondent's motion for an extension of the effective date of respondent's order of suspension, Bar Counsel's opposition, and respondent's reply thereto, it is

ORDERED that respondent's motion is granted only to the extent that the effective date of respondent's suspension shall be 30 days from the date of this Court's original order of November 21, 1996.

PER CURIAM

Copies to:

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District of Columbia
Court of Appeals

FILED MAY 2, 1997

No. 96-BG-1244

In the Matter of
KAREN S. DAY, ESQUIRE
A Member of the Bar of the
District of Columbia
Court of Appeals

BDN: 211-96

BEFORE: Wagner, Chief Judge; Ferren, Terry, *Steadman, Schwelb, *Farrell, King, Ruiz, and Reid, Associate Judges; and *Belson, Senior Judge.

ORDER

On consideration of respondent's petition for rehearing or rehearing en banc, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that the majority of the judges of this court has voted to deny the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Copies to:

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DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Bar Docket No. 211-96

In the Matter:

KAREN DAY,

Respondent.

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

On September 22, 1988, Respondent filed with the Supreme Court of Florida an Amended Petition To Resign pursuant to §3-7.11 of the Florida Bar Rules. Respondent sought to resign permanently in the face of a pending disciplinary investigation involving the misuse of client funds. The amended petition was unopposed by Florida Bar Counsel, and it was granted by the Florida Supreme Court on November 17, 1988.

Bar Counsel in this jurisdiction learned of the resignation in May, 1996 and in September, 1996, Bar Counsel notified the Court of Respondent's resignation and the action of the Florida Supreme Court. Bar Counsel enclosed a Proposed Order for the Court to suspend Respondent pursuant to D.C. App. Rule XI, § 11 (d) pending the outcome of these reciprocal discipline proceedings. Respondent opposed the interim suspension, arguing that her Florida resignation did not constitute "discipline." On November 21, 1996, the Court entered an order, suspending Respondent from the practice of law in this jurisdiction and referring the matter to the Board for proceedings to determine whether reciprocal discipline should be imposed.

Respondent has filed a Petition for Rehearing or Rehearing En Banc concerning the interim suspension order. The Court of Appeals has not acted on her petition. She also filed a Motion for Oral Argument and requested expedited

action by the Board. The Board granted the motion for an oral argument and this matter was heard on February 6, 1997.

A. Factual Background

Respondent has submitted a Statement in Opposition to Reciprocal Discipline in which she sets forth a detailed chronology of the events preceding her resignation from the Florida Bar. Bar Counsel does not take substantial issue with most of these facts, although he does object to her claim of innocence as well as her argument that her resignation should not be treated as discipline for the purposes of Rule XI, §11. A statement of the pertinent facts is set forth here for purposes of this discussion.

1. Events in Florida

Respondent graduated from George Washington University School of Law in 1981 and was admitted to practice in this jurisdiction later that year. In 1982, Respondent moved to Florida to be nearer to her family. She was admitted to the Bar of the Supreme Court of Florida in 1982.

In September, 1983, Respondent married Mr. Thomas Bohn, whom she apparently had known for a relatively short time, and now states that she did not know many details of his past, including a prior felony conviction.

Using Respondent's name, Mr. Bohn started several businesses, including an investigative agency ("Day-Bohn Associates") and a company, Intercounty Lawyers Services ("Intercounty") that served subpoenas and other legal documents. Respondent was herself employed at a law firm at this time and was not actively engaged in the operation of these companies.

In 1985, Respondent notarized a series of documents for Intercounty when the notary/secretary went on a maternity leave. Respondent went to Intercounty on her lunch hour and notarized stacks of affidavits. Although the people signing the affidavits were known to her, she did not witness these

individuals sign each document due to the volume of affidavits. She also left her notary seal at the Intercounty office, apparently in an unsecured area.

In September, 1985, Respondent learned about her spouse's criminal history from newspaper stories regarding a Florida state agency accusation that Intercounty had submitted false affidavits of service. Respondent learned that in 1963, Bohn had been convicted of tampering with the mails and had served 14 months in a federal prison. He had also been convicted of passing forged documents in 1974 and had been sentenced to four years probation. The newspapers also disclosed that Bohn had used a number of aliases and had been married four previous times.

In October, 1985, Bohn testified in a criminal trial on behalf of an individual who then was convicted of racketeering, fraud, grand theft, and sale of unregistered securities. In December, 1985, Bohn was charged with perjury in connection with this testimony.

To complicate matters further, Respondent's own personal life was becoming more difficult. At this point in time, she was pregnant with their second child; that child was born in February, 1986 with a heart condition. Respondent resigned from her law firm position in April, 1986 and opened her own practice. In March, 1987, Bohn was convicted of the perjury charge, and he subsequently appealed the conviction.

In March, 1988, Respondent was publicly reprimanded by the Florida Bar for notarizing, over a two or three week period, "'thousands of affidavits' without requiring the affiants to personally appear before [her]" at Intercounty. (Report of Referee, Supreme Court of Florida, October 6,1987). The Florida disciplinary authorities also found that Respondent was negligent in leaving her notary seal at the Intercounty office, enabling Bohn to use it improperly and forge her signature on additional affidavits of service.

Respondent did not report this Florida discipline to this jurisdiction as she is required to do under Rule XI, §11(b).[1]

Also, in March, 1988, Bohn's perjury conviction was affirmed on appeal. During this time period, Respondent discovered that funds were missing from her escrow account when several checks were returned for insufficient funds, and the Florida Bar commenced a disciplinary investigation of the matter. In June, 1988, Bohn was sentenced to six months in jail on the perjury conviction. On July 2, 1988, Respondent filed a Petition For Leave To Resign in the Supreme Court of the State of Florida. That petition was opposed by the Florida Bar by a vote of the Board of Governors in light of the pending disciplinary investigation for "serious trust account violations involving misappropriation in addition to the improper and inadequate trust account record keeping and instances of trust checks returned by the bank for insufficient funds cited by the Petitioner in the Petition To Resign". (Florida Bar Counsel Response in Opposition to Petition For Leave To Resign, August 30, 1988, paragraph 2 ("Florida Response")).

The Florida Response also noted Respondent's failure to cooperate in the disciplinary and Client Security Fund investigations of the charges. The Florida Response further noted Respondent had not stated a willingness to reimburse the Client Security Fund and to satisfy any judgments arising out of the misuse of trust funds. In addition, the Florida Bar opposed resignation since the petition "in failing to provide any specific period of resignation, is inadequate to protect the public should the serious trust fund misappropriation be

---

[1] It is ironic that if Respondent had complied with the Rule XI, §11(b) reporting requirement, the passage of time between her disciplinary resignation and this jurisdiction's knowledge of it might not have been so substantial. It is likely that Bar Counsel and the disciplinary system in this jurisdiction would have become aware of Respondent's involvement in the subsequent disciplinary investigation and would have been able to institute proceedings at that time based on her resignation.

proven." (Florida Response at paragraph 5). The Florida Response noted that "should these allegations be proven, disbarment would be appropriate and the perception of the public of the legal profession would be hindered if respondent were allowed to voluntarily resign for no set time period and without a thorough investigation by The Florida Bar into possible violations." (Florida Response, at paragraph 5).

On September 22, 1988, Respondent filed an Amended Petition For Leave To Resign in which she recited the facts of her previous public reprimand and acknowledged the pendency of a Florida disciplinary investigation for failure to properly maintain trust accounts and for having a check in the sum of $81.50 returned by the bank for insufficient funds. (Amended Petition For Leave To Resign, paragraph 3 ("Amended Petition")). Respondent agreed to reimburse the Florida Client Security Fund and to satisfy any judgments arising out of misuse of trust funds.

Respondent further stated in the Amended Petition

> Due to compelling personal and family matters, Petitioner closed her law practice effective July 15, 1988 and is currently employed in another capacity not involving the practice of law in any manner. **Petitioner does not ever intend to practice law in the future**. Amended Petition, paragraph 5)(emphasis added)

She applied for leave to permanently resign without leave to reapply, pursuant to the Rules Regulating The Florida Bar, Rule 3-7.11, pending disciplinary action, stating in the Amended Petition that "[a]cceptance of a resignation without leave to reapply is proper when there are pending investigations charging an attorney with trust account violations. The Florida Bar v. Caudill, 468 So.2d 989 (Fla. 1985)" (Amended Petition, paragraph 9). The Amended Petition further noted that "the granting of this petition will afford a far greater punishment than the severe discipline of disbarment for which readmission is possible after five years.

The Florida Bar v. Alfieri, 428 So.2d 662 (Fla. 1983)." (Amended Petition, paragraph 8).

The Florida Bar did not oppose the Amended Petition seeking permanent resignation, stating that "this permanent resignation provides more severe sanctions than even disbarment." (The Florida Bar Response to Amended Petition For Leave To Resign, paragraph 3). The Supreme Court of Florida approved the uncontested amended petition effective December 19, 1988, allowing Respondent thirty days to close out her law practice. She was ordered not to accept any new business during the closeout period.

In accordance with Florida Rule 3.7-11, the disciplinary investigation of the missing escrow funds was closed. No criminal proceedings were instituted against her.

Subsequent to her permanent resignation from the Florida Bar, Respondent engaged in a series of professional activities related to the law -- paralegal instructor, writer for a legal newspaper, and instructor in international law at the University of Central Florida. In 1993, she began working for the university as an "immigration specialist" while she continued to teach there. In October, 1994, she "provided immigration-related services to the university on a contract basis" (Statement of Karen S. Day In Opposition To Reciprocal Discipline, December 26, 1996, page 9 ("Statement")). In May, 1995, Respondent "established an exclusively federal immigration law practice to serve the university and other clients." (Statement at 9). Her business card, Exhibit G to Statement of Bar Counsel, states "Admitted Washington, D.C. Bar Only, Practice Limited To Immigration and International Law."

Respondent does not contest that she was practicing law, but rather asserts that her practice was a "federal" practice, based on her admission to the D.C. Bar and thus, not in violation of her resignation from the Florida Bar.

2. Proceedings in This Jurisdiction

The proceedings in this jurisdiction resulted from Bar Counsel learning in 1996 of Respondent's resignation from the Florida Bar and filing with the Court of Appeals a certified copy of documents, including the order of the Supreme Court of Florida granting her leave to resign without leave to reapply. On November 21, 1996, the Court of Appeals suspended Respondent, pursuant to Rule XI, §11 (d). Respondent filed a Petition for Rehearing or Rehearing En Banc on November 25, 1996.

In her Statement in Opposition To Reciprocal Discipline, Respondent argues that she is not guilty of any conduct warranting suspension or disbarment. She attaches an affidavit from her former husband, Thomas Bohn who states, inter alia, that "during the time she was in private practice, I removed funds from her client trust account without her knowledge, consent, or authorization." He further states "[t]hat I encouraged her to resign from the Florida Bar rather than to testify against me in any proceeding which may have resulted from my actions." (Bohn Affidavit, December 9, 1996).

On December 26, 1996, Respondent filed an Affidavit of Compliance with Section 14 of Rule XI. In it she states that the notice requirements of Rule XI, §14 are inapplicable in her case because she does not represent clients "in litigated matters or administrative proceedings in any court of the District of Columbia, or in pending matters before any District of Columbia government agency." She states that her practice is limited to "matters before federal immigration agencies, departments, or courts."

An oral argument was held before the Board on February 6, 1997. At the argument, Bar Counsel informed the Board that there were no bank records or Florida disciplinary investigation materials available at this time. Apparently, the Florida Bar officials had disposed of their records since

Respondent had petitioned for permanent resignation and stated that she did not intend to practice law in the future.

B. Florida Disciplinary Rules

The Florida Rules provide a procedure for resignation which may be used when an attorney is not facing a disciplinary or criminal investigation or proceeding. Florida Rule 1-3.4. There is a separate procedure set forth in Florida Rule 3-7.12, titled in 1988, "Resignation from The Florida Bar," which is applicable if a disciplinary investigation is underway or if a disciplinary agency has recommended probable cause.[2] If either of these latter circumstances exist, an attorney may resign from the Florida Bar only by a petition to resign which complies with Rule 3-7.12(a). The petition to resign is required to be filed with the Supreme Court and must contain a statement of all past and pending disciplinary and criminal proceedings, the charges in such proceedings, and the results of past proceedings and status of pending proceedings. The petition must also state whether it is with or without leave to reapply. Pursuant to Rule 3-5.1(j) of the Florida Rules, "disciplinary resignation" is for a minimum period of three years and "a petition that states that disciplinary resignation is without leave to apply for readmission shall preclude readmission to the bar."

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[2] The amendment of the Florida Rules subsequent to Respondent's resignation further demonstrates the meaning of these provisions. The changes made in 1993 are not substantive and simply clarify the law existing at the time of Respondent's resignation. The rule under which Respondent resigned was redesignated and retitled: Rule 3-7.11 "Resignation from The Florida Bar, was changed to Rule 3-7.12 "Disciplinary Resignation from The Florida Bar." The actual content of the rule was not modified.

In addition, Rule 3-5.1, specifying the various types of discipline, had a new subsection added. Subsection (j) "Disciplinary Resignation" simply refers to the procedure authorized by Rule 3-7.12 (and the old 3-7.11) and expressly states that an attorney may be allowed to resign in lieu of defending against allegations of disciplinary violations.

The application procedure for readmission after disciplinary resignation is identical to that prescribed for disbarred and suspended attorneys. Rule 3-7.10(a) sets forth the requirements and procedure for reinstatement and readmission and states "[a] former member who has been disbarred or whose petition for disciplinary resignation has been accepted, pursuant to 3-7.12, may be admitted again only upon full compliance with the rules and regulations governing admission to the bar." (Rule 3-7.10 (a)). Subsection (m) provides a three-year minimum time period after the Supreme Court acceptance of the disciplinary resignation and states "[i]f an attorney's petition for disciplinary resignation states that it is without leave to apply for readmission, such condition shall preclude any readmission." The rules also provide for an evidentiary hearing before a referee to determine fitness to practice law prior to reinstatement. The contents of the readmission petition are also specified in Rule 3-7.10(n)(3); they relate to the type of information traditionally sought in fitness hearings in this jurisdiction. Perhaps significantly for Respondent, Rule 3-7.10(n)(3)(D) seeks "the nature of the petitioner's occupation in detail since suspension, with names and addresses of all partners, associates in business, and employers, if any, and dates and duration of all such relations and employments."

DISCUSSION

The Court recently has addressed the issue of whether a resignation under Rule 3-7.11 of the Florida Rules is "discipline" for the purpose of reciprocal discipline in this jurisdiction. In re Richardson, Docket No. 95-BG-639 (D.C. April 17, 1997). The Court concluded that a resignation under §3-7.11 of the Florida Bar Rules was discipline for the purposes of Rule XI, §11.

> We conclude that Richardson's Florida resignation while a disciplinary proceeding was pending against him amounted to "discipline," and that this court's imposition of reciprocal discipline under the

> circumstances will not violate either his statutory or his constitutional rights. Richardson, slip. op. at 1-2.

While Respondent is well-represented by counsel who portrays her and her circumstances in a very sympathetic manner, the Board sees no basis to depart from its earlier decision, upheld in Richardson, that a resignation under Rule 3-7.11 (b) (renumbered as Rule 3-7.12), is a sufficient basis for reciprocal discipline.

Respondent argues that the Florida procedure does not require or result in an adjudication of guilt, findings of fact, or an admission of wrongdoing. These objections also were raised by the respondent in Richardson. The Board did not agree with this approach, and the Court expressly concurred with the Board's view. In Richardson, the Court further stated:

> It is true that, when disciplinary proceedings have been initiated, Florida does not require the respondent attorney to admit the charges as a condition of the attorney's resignation from the bar. We agree with the Board, however, that the Supreme Court of Florida's acceptance of Richardson's resignation while a disciplinary proceeding was pending against him constituted "discipline" both in Florida and under our Rule XI, §11. Id. at 6-7 (citation omitted).

The Board notes that the purposes underlying the Florida resignation procedure are virtually identical to the purposes of disciplinary proceedings -- protection of the public and the administration of justice. For example, the American Bar Association "Standards For Imposing Lawyer Sanctions", approved February, 1986, states:

> 1.1 Purpose of Lawyer Discipline Proceedings. The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their

> professional duties to clients, the public, the legal system, and the legal profession. (Standards at page 17).

In comparison, the Florida Rules provide that the Supreme Court of Florida shall enter an order granting leave to resign, after considering the petition for leave to resign, any response thereto, and the charges against the petitioner if it has been shown by the petitioner in a proper and competent manner that the public interest will not be adversely affected by the granting of the petition and that such will not adversely affect the purity of the courts nor hinder the administration of justice nor the confidence of the public in the legal profession. (Rule 3-7.12(b)).

It is apparent that the decision of the Florida Supreme Court, while not technically findings of misconduct, is made in the context of a disciplinary investigation and rests upon a "proper and competent" showing by the petitioner that the same purposes underlying the disciplinary system will be served by the resignation. The Court in Richardson stated it thusly:

> This required scrutiny of resignations is understandable. When a disciplinary proceeding is pending against an attorney, that attorney's resignation from the bar, without disciplinary consequences, would preserve the right to apply for readmission, as well as to apply for admission in another state, without effective scrutiny of the attorney's professional record -- a result entirely at odds with the court's obligation to protect the public and the integrity of the bar. (citations omitted).

Id. at 7.

Moreover, just as the Court in Richardson noted that the respondent could "claim no surprise at this analysis," the cases cited by Respondent in her Amended Petition demonstrate her full knowledge of the options before her. Respondent added citations to The Florida Bar v. Alfieri, 428

So.2d 662 (Fla. 1983) (per curiam), and The Florida Bar v. Caudill, 468 So.2d 989 (Fla. 1985), to her initial petition. In Alfieri, the attorney, having pled guilty to two felony charges filed a petition for leave to resign which was opposed by the Florida Bar Board of Governors. The Board of Governors voted to oppose the petition unless it was amended to specify that it was without leave to apply for readmission. The Florida Supreme Court granted the petition over the opposition of the Bar, reasoning that since an attorney could apply for readmission after three years, the same period of time that a disbarred attorney had to wait, "we can see no reason to prolong these proceedings, and we grant [petitioner's] petition to resign." Alfieri, 428 So.2d 663. Respondent knew that she could have left her initial petition before the Supreme Court, even though opposed by the Florida Bar, and hoped that the Supreme Court would simply grant it under this precedent.

Respondent instead chose to follow the option established in Caudill where the petitioner was the subject of three pending disciplinary actions involving trust account shortages and improper record keeping. Caudill had a record of prior discipline, having been suspended previously due to a felony conviction. His petition to resign permanently, which was not opposed by the Florida Bar, was granted by the Supreme Court.

Respondent's motivation for choosing this particularly harsh sanction is also not relevant. While the Board can be sympathetic to the predicament posed to Respondent by the unfortunate circumstances involving her husband and father of her children, Respondent was clearly aware of her options, including the fact that she could have requested a specified term of years for her resignation, such as the equivalent of disbarment. Instead, she chose to represent to the Florida Bar and Florida Supreme Court that she did "not ever intend to practice law in the future." She specifically rejected requesting resignation with the potential for readmission after a stated number of years.

RECIPROCAL DISCIPLINE CONSIDERATIONS

Having concluded that the disciplinary resignation under the Florida rules is the functional equivalent of discipline, the Board must next determine whether reciprocal discipline should be imposed. D.C. App. R XI, §11 (c); In re Gardner, 650 A.2d 693 (D.C. 1994). While this jurisdiction recognizes a presumption that the discipline imposed by the disciplining court should be imposed on a reciprocal basis, In re Zilberberg, 612 A.2d 832, 834 (D.C. 1992), the Board must examine whether any of the exceptions in §11 (c) apply.[3]

Respondent argues first that she is not guilty of any misconduct warranting discipline in this jurisdiction and that no further proceedings are warranted. At the oral argument, counsel for Respondent, in response to a question from the Board, also argued that the "grave injustice" exception could apply if the Board did not adopt his first lines of defense to the imposition of reciprocal discipline.

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[3] Rule XI, §11 (c) of the D.C. Rules of Professional Conduct is as follows:

> Reciprocal discipline shall be imposed unless the attorney demonstrates, by dear and convincing evidence, that:
>
> (1) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (2) There was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistently with its duty, accept as final the conclusion on that subject; or
>
> (3) The imposition of the same discipline by the Court would result in grave injustice; or
>
> (4) The misconduct established warrants substantially different discipline in the District of Columbia; or
>
> (5) The misconduct elsewhere does not constitute misconduct in the District of Columbia.

Bar Counsel asserts that in invoking the provisions of Rule 3-7.11, Respondent waived her right to present a substantive defense and that none of the exceptions to the imposition of reciprocal discipline under Rule XI are applicable to this case. Bar Counsel asserts that disbarment would be the appropriate sanction in an original case involving misuse of client funds, citing In re Addams, 579 A.2d 190 (D.C. 1990 (en banc). Bar Counsel also asserts that permanent disbarment, essentially what Respondent has chosen to impose on herself in Florida, is not within the range of sanctions here, citing In re McBride, 602 A.2d 626 (D.C. 1992) (en banc).

1. Due Process

In considering Respondent's due process claim, the Board and the Court should consider (1) whether the disciplinary procedure in Florida afforded Respondent reasonable notice and a meaningful opportunity to be heard, and (2) whether Respondent waived these rights. D.H. Overmyer Co. v. Frick, 405 U.S. 174, 185-86 (1972); Sherman v. Commission of Licensure to Practice, 407 A.2d 595, 601 (D.C. 1979).

Respondent's Amended Petition to Resign contains ample evidence of her knowledge of the nature of the Florida disciplinary investigation and, as discussed earlier, her understanding of the options before her. She chose to petition to resign in order to toll permanently the disciplinary proceedings. Respondent waived her due process rights when she petitioned to resign and having done so in Florida, she may not assert a due process deficiency here in order to avoid the consequences of her actions. As we have noted, her waiver was knowing and voluntary, as her Amended Petition amply demonstrates that she was aware of the possible outcomes and consequences of a disciplinary resignation.

Furthermore, as the Court noted in Richardson, a respondent's "loss of an evidentiary hearing in Florida was [her] own choice; by electing to resign, [s]he waived [her]

right to a hearing where [s]he could have contested the charges." Slip. op. at 12. Accordingly, the Board finds that Respondent's use of the Florida disciplinary resignation procedure did not deprive her of her due process rights.

2. Infirmity of Proof

Having taken steps to assure that the Florida disciplinary investigation would be dismissed, the Respondent should not be allowed to argue here that there was an infirmity of proof that should serve as the basis for avoiding reciprocal discipline here. Respondent's actions in Florida and the passage of time have effectively deprived this jurisdiction of the ability to conduct an independent investigation. The Florida Supreme Court made a determination, based on Respondent's petition and the Florida Response, and concluded that Respondent should be allowed to resign. Respondent does not offer a basis for disturbing that conclusion, and the Board does not perceive any reason for doing so.

3. Grave Injustice

Respondent has filed the affidavit of her former husband to establish her innocence of wrongdoing and argues that the record, now including the affidavit, supports a finding that the imposition of reciprocal discipline would result in grave injustice. The Board does not agree.

The Board has not asked for briefing by the parties on the issue of what type of evidence is appropriate to make a showing under this subsection of Rule XI. It is possible that the rule contemplates that a respondent could meet her burden of demonstrating the existence of "grave injustice" by the filing of an affidavit. Bar Counsel no doubt would argue that he is prejudiced by an affidavit, since he had no opportunity to cross-examine the affiant or to introduce evidence in rebuttal. An affidavit might be sufficient to cause the Board to refer the matter to a hearing committee for further proceedings. The Board need not decide this issue in this matter, however, because it does not view the affidavit filed

by Respondent to be even minimally adequate to demonstrate the existence of this exception.

The affidavit does not contain any factual recitation regarding the exact nature of Mr. Bohn's misconduct and merely confesses "[t]hat during the time she was in private practice, I removed funds from her client trust account without her knowledge, consent, or authorization." (Bohn Affidavit at paragraph 3). The affidavit does not address basic issues, and substantial questions remain concerning the amount of funds removed, the methods used by Bohn to achieve this, the systems employed by Respondent to ensure the integrity of her client funds, and so forth. In light of the blatant inadequacy of this affidavit, the Board declines to use this matter to define the parameters of the type and level of proof necessary to show a "grave injustice" in a reciprocal proceeding.

The Board further notes that Respondent entered private practice at a point in time when she was fully aware of her husband's criminal record as well as the criminal investigation which ultimately led to his perjury conviction. Respondent also knew of the state agency investigation of Intercounty for false affidavits of service. In addition, Respondent was under investigation herself and subsequently disciplined for actions involving her husband's service of process business, where Respondent's notary seal was misused by her husband who had also forged her name to affidavits of service. Finally, it was Respondent's choice to terminate the disciplinary investigation of the trust account overdrafts, and she precluded Florida from developing the facts involved in this situation.

In light of all of this information, it was incumbent on Respondent to design and run her law practice in a manner that assured the integrity of client funds and materials and insured that her office systems were protected from her husband. It was, or should have been, abundantly clear that her husband could not be trusted. While we may never know exactly how he gained access to client trust funds, the fact that

he was able to do so at all, arguably without Respondent's direct knowledge, is testament to the absence of sufficient and effective office management controls. Under these circumstances, the Board concludes that Respondent is culpable for the misuse of client funds. At a minimum, she showed reckless disregard of her fiduciary responsibilities when she failed to exercise adequate supervision and control over her client trust fund checking account. Therefore, under these circumstances, the Board does not find that it would be a grave injustice to impose reciprocal discipline.

4. Sanction

There is a rebuttable presumption that the discipline imposed by a disciplining authority in another jurisdiction should be imposed on a reciprocal basis. In re Zilberberg, 612 A.2d at 834 (D.C. 1992). The discipline imposed in Florida, permanent disbarment, is beyond the outside range of sanctions for misappropriation in this jurisdiction. While not conceding that this exception to Rule XI applies, Bar Counsel notes that "no such sanction [as permanent disbarment] is imposed in original disciplinary matters in this jurisdiction. In re McBride, 602 A.2d 626 (D.C. 1992)(en banc); In re White, 605 A.2d 48 (D.C. 1992)(attorney permanently disbarred in New Jersey eligible to seek reinstatement after reciprocal disbarment)."

The Board has considered whether the record supports imposition of a sanction less than disbarment, as that term is used in this jurisdiction, and concluded that it does not. For the sake of argument, the Board reviewed the record to determine whether it would support a finding of misappropriation resulting from simple negligence, which would justify a lesser sanction of a six-month suspension.

The record consists of the materials filed with the Florida Supreme Court, and pleadings filed by Bar Counsel and Respondent in this jurisdiction, including the Bohn affidavit. The Board perceives numerous problems with the Bohn affidavit, beginning with the fact that Mr. Bohn is a convicted

perjurer. As discussed above, the Board does not believe that the Bohn affidavit, even if accepted as completely true, can support a finding of simple negligence by the Respondent. The affidavit does not include any factual recitation which leaves open substantial questions about the nature of the misconduct. In addition, according to Bar Counsel's uncontradicted representation at the oral argument before the Board, there is no documentary evidence available at this date for an independent consideration of the facts. Thus, a referral of the matter to a hearing committee for a recommendation of an appropriate sanction would be fraught with difficulties, and Bar Counsel would be at a distinct disadvantage posed by the absence of documentary evidence and the limited range of his subpoena power.

As the Court has recently reiterated in In re Pierson, 690 A.2d 941, 947 (D.C. 1997) "'when client funds are deposited into an attorney's operating account . . . misappropriation occurs when the balance in that account falls below the amount due to the client . . .'" (citations omitted). Where the Board has confronted a situation where a respondent asserts lack of knowledge of the misuse of client funds, the Board has been able to conduct a careful review of the underlying facts. Here, as in many reciprocal cases, that is not possible. Under the present circumstances, reliance on the presumption in favor of reciprocal discipline is a necessary and expedient resolution of these issues.

Finally and perhaps most significantly, the Respondent has not contributed to the record any description of the actual events underlying the Florida disciplinary investigation as offered by the Respondent. She has merely offered the affidavit of her former husband, with its cursory statements, as proof of her "innocence." Under these circumstances, the Board sees no basis to rebut the presumption of reciprocal discipline.

5. Misconduct in the District of Columbia

Respondent was never formally charged in Florida. She invoked the disciplinary resignation prior to the completion of investigation by the Florida Bar Counsel. However, Respondent's Amended Petition to Resign recites:

> There is currently pending an investigation by the Florida Bar for the Petitioner's failure to comply with Florida Bar Rule 5 regarding maintaining trust accounts and specifically relating to Petitioner's failure to properly maintain trust account records and having a check in the sum of $81.50 returned by the bank for insufficient funds. (Amended Petition, paragraph 3).

There can be no doubt that misuse of client trust funds would constitute misconduct in the District of Columbia, a violation of Rule 1.15(a). While the exact nature of the trust fund violations is important for the purposes of determining the level of sanction, the issue in Rule XI, §11 (c)(2) is whether there would any misconduct in this jurisdiction. The Bohn Affidavit proffered by Respondent, if nothing else, makes clear that funds were removed from Respondent's trust account. Respondent does not argue that this exception applies.

CONCLUSION

Viewed in its most sympathetic light, Respondent's situation could be described as a tragic example of a naive lawyer, doubly victimized by an evil and manipulative spouse and by her own ill-considered choice, made during a period of stress, to seek permanent resignation from the Florida bar in an effort to remove herself from an embarrassing and disgraceful situation. With such a view, the imposition of disbarment as reciprocal discipline in this jurisdiction seems harsh indeed.

The Board does not believe that this view is justified. The record in this matter is sparse by Respondent's own

design, first by her invocation of the Florida disciplinary resignation procedure and now by her decision to place in the record a single affidavit, with no factual detail and no supporting information, relating to the Florida misuse of client funds. Absent any other evidence, the Board is left with the fact that the misappropriation of client funds occurred at a period in time when Respondent was fully aware of the failings and criminal proclivities of her then spouse. Having accomplished what she desired with respect to ending the Florida disciplinary proceeding, Respondent then set about to reestablish her legal career, using her bar membership in this jurisdiction to set up a law practice in the very state where she had stated that she did "not ever intend to practice law in the future." While renewing her membership here for over eight years, Respondent never disclosed that she was permanently foreclosed from practicing law in the state of her actual residence and employment. It is difficult for the Board to feel great sympathy for Respondent under these facts. The Board believes that it is the latter version of facts which should control the outcome here and accordingly, the Board recommends the imposition of disbarment as reciprocal discipline.

Therefore, the Board recommends that the Court impose reciprocal discipline and order Respondent disbarred.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /s/ Karen Christensen
Karen Christensen
Chair

Dated: 5/14/97

All the members of the Board concur in this Report and Recommendation.

IN THE
SUPREME COURT OF THE STATE OF FLORIDA

RECEIVED
JUL. 22, 1988
THE FLORIDA BAR
Orlando

IN RE:
KAREN S. DAY,

Petitioner

PETITION FOR LEAVE TO RESIGN

KAREN S. DAY, a member of the Florida Bar, hereby petitions this Court for leave to resign pursuant to Florida Bar Rule 3-7.11 and states as follows:

1. The petitioner was admitted to practice in the state of Florida on November 29, 1982.

2. An opinion imposing disciplinary action was rendered against the petitioner on March 3, 1988 for notarizing affidavits without requiring the affiants to personally appear before her. A public reprimand was issued and a judgement for costs entered in the sum of $931.45.

3. There is currently pending an investigation by the Florida Bar for the Petitioner's failure to comply with Florida Bar Rule 5 relating to maintaining trust account records and for having a check returned by the bank for insufficient funds.

4. There are no past or pending criminal proceedings against Petitioner.

5. Petitioner has compelling personal and family matters which cause her to request to resign from the practice of law at this time.

WHEREFORE, Petitioner requests leave to resign with leave to reapply pursuant to the applicable rules.

Dated this (illegible) day of July, 1988.

/s/ Karen S. Day
Karen S. Day

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail/hand delivery on this (illegible) day of (illegible), 1988, to John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida and Jan Wichrowski, Bar Counsel, The Florida Bar, Orlando, Florida.

/s/
Karen S. Day

IN THE SUPREME COURT OF FLORIDA

Case No. 72, 794
[TFB No. 89-30, 096 (09B)]

SEP (illegible text)
CLERK (illegible text)

IN RE: THE FLORIDA BAR,
Resignation of KAREN S. DAY,
Petitioner.

RESPONSE IN OPPOSITION TO PETITION FOR LEAVE TO RESIGN

COMES NOW, The Florida Bar pursuant to Rule 3-7.11(b), Rules of Discipline and responds to Petitioner's Petition for Leave to Resign filed July 19, 1988, and states as follows:

1. The Board of Governors has considered Petitioner's Petition for Leave to Resign and has directed the undersigned to oppose this Petition.

2. The Bar's Opposition to Petitioner's Resignation is based on the following grounds:

There is currently a pending investigation against the respondent for trust account violations as stated by respondent in her petition. Preliminary investigation has indicated a basis for possible allegations of serious trust account misappropriations in addition to the improper and inadequate trust account record keeping and instances of trust checks returned by the bank for insufficient funds cited by Petitioner in the Petition for Leave to Resign.

3. Due to the fact that these allegations are relatively recent, there has not yet been an opportunity for a complete

investigation and probable cause hearing pursuant to Rule 3-7.3, Rules of Discipline.

4. Based upon the investigation to date, however, it is believed that Ms. Day's petition is insufficient in that it fails to state a length of time for the resignation in this case which may involve serious trust account misappropriations.

5. This Petition to Resign, in failing to provide any specific period of resignation, is inadequate to protect the public should the allegations of serious trust fund misappropriations be proven. Further, should these allegations be proven, disbarment would be appropriate and the perception of the public of the legal profession would be hindered if respondent were allowed to voluntarily resign for no set time period and without a thorough investigation by The Florida Bar into possible violations.

6. Further, Petitioner has not indicated a willingness to cooperate with the Florida Bar's pending investigation in her Petition.

7. Further, Petitioner has not indicated any willingness in her Petition to cooperate with The Florida Bar's Client Security Fund investigations, reimburse the Client Security Fund for payments made on possible claims against her, and satisfy any judgments arising out of misuse of trust funds.

WHEREFORE, The Florida Bar respectfully requests that this Court deny Petitioner's Petition for Leave to Resign.

Respectfully submitted,

/s/ Jan Wichrowski
Jan K. Wichrowski
Bar Counsel
The Florida Bar
605 E. Robinson Street
Suite 610
Orlando, Florida 32801

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Response in Opposition to Petition for Leave to Resign has been furnished by U.S. Mail to the Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy has been furnished by certified mail, return receipt requested no. P 938 917 832, to Petitioner, Karen S. Day, 33 E. Robinson Street, Suite 200, Orlando, Florida, 32801; and a copy has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300 on this 30th day of August, 1988.

/s/ Jan Wichrowski
Jan K. Wichrowski
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

Case No. 72, 794

RECEIVED
SEP. 23, 1988
THE FLORIDA BAR
Orlando

IN RE: THE FLORIDA BAR,

Resignation of KAREN S. DAY,

Petitioner.

AMENDED PETITION FOR LEAVE TO RESIGN

Petitioner KAREN S. DAY hereby files this Amended Petition for Leave to Resign pursuant to Florida Bar Rule 3-7.11 and in support thereof states as follows:

1. The Petitioner was admitted to practice law in the State of Florida on November 29, 1982.

2. Previous disciplinary action has been taken against Petitioner as follows: On March 3 1988 an opinion imposing disciplinary action was rendered against the Petitioner for notarizing affidavits without the affiant appearing personally before her; imposing a Public Reprimand and assessing costs in the sum of $931.45

3. There is currently pending an investigation by the Florida Bar for the Petitioner s failure to comply with Florida Bar Rule 5 regarding maintaining trust accounts and specifically relating to Petitioner's failure to properly maintain trust account records and having a check in the sum of $81.50 returned by the bank for insufficient funds.

4. There are no past nor present pending criminal proceedings against the Petitioner

5. Due to compelling personal and family matters, Petitioner closed her law practice effective July 15, 1988 and is currently employed in another capacity not involving the practice of law in any manner. Petitioner does not ever intend to practice law in the future.

6. Petitioner requests leave to permanently resign without leave to reapply.

7. Petitioner agrees to reimburse the Florida Bar's Client Security Fund for any payments made on any possible claims against her and to satisfy any judgements which may arise out of any misuse of trust funds by Petitioner.

8. The granting of this petition will not have any adverse effect on the public interest, on the purity of the courts, on the administration of justice, or public confidence in the legal profession because even if the accusations against the Petitioner were true, the granting of this petition will afford a far greater punishment than the severe discipline of disbarment for which readmission is possible after five years. *The Florida Bar v. Alfieri*, 428 So2d 662 (Fla. 1983).

9. Acceptance of a resignation without leave to reapply is proper when there are pending investigations charging an attorney with trust account violations. *The Florida Bar v. Caudill*, 468 So2d 989 (Fla. 1985).

WHEREFORE the Petitioner respectfully requests that this petition be granted.

*/s/*_____

Karen S. Day
P.O. Box 981
Orlando, Florida 32802
(407) 422-1202

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail Certified Return Receipt Requested on this 22nd day of September, 1988, to: Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and Jan Wichrowski, Bar Counsel, The Florida Bar, 605 East Robinson Street, Suite 610, Orlando, Florida 32801 and the original of the foregoing or the above date to: the Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927.

/s/ Karen S. Day
Karen S. Day
Petitioner

IN THE SUPREME COURT OF FLORIDA

Case No. 72, 794
[TFB Case No. 89-30, 096 (CRE) (09B)]

OCT (illegible text)
(illegible text) COURT

IN RE: THE FLORIDA BAR,

Resignation of KAREN S. DAY,

Petitioner.

RESPONSE TO AMENDED PETITION FOR LEAVE TO RESIGN

COMES NOW, The Florida Bar in response to Petitioner's Amended Petition for Leave to Resign permanently from The Florida Bar and states:

1. On September 22, 1988, Petitioner submitted her Amended Petition for Leave to Resign from The Florida Bar in which Petitioner seeks permanent resignation from The Florida Bar without leave to reapply pursuant to the Rules Regulating The Florida Bar, Rule 3-7.11 pending disciplinary action.

2. Based upon respondent's representations contained in the Amended Petition for Leave to Resign that Petitioner agrees to reimburse The Florida Bar's Clients' Security Fund for any possible payments made on any claim against her and to satisfy any judgments which may arise out of any misuse of funds, The Florida Bar's Board of Governors has voted to approve respondent's permanent resignation from The Florida Bar.

3. The granting of her Petition will not adversely affect the purity of the courts nor hinder the administration of

justice, nor the confidence of the public in the legal profession due to the fact that this permanent resignation provides more severe sanctions than even disbarment.

WHEREFORE, The Florida Bar respectfully requests that Petitioner be granted leave to resign permanently from The Florida Bar without leave to reapply subject to the conditions outlined in paragraph two, above.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 222-5286

and

JAN K. WICHROWSKI
Bar Counsel
The Florida Bar
605 East Robinson Street
Suite 610
Orlando, Florida 32801
(407) 425-5424

By: /s/ Jan Wichrowski
JAN K. WICHROWSKI
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Response to Amended Petition for Leave to Resign has been furnished by regular U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. mail to Petitioner, Karen S. Day, at Post Office Box 981, Orlando, Florida, 32802; and a copy of the foregoing has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 5th day of October.

Supreme Court of Florida

Thursday, November 17, 1988

Case No. 72,794
TFB No. 89-30,096 (CRE) (09B)

RECEIVED
NOV. 21, 1988
THE FLORIDA BAR
Orlando

THE FLORIDA BAR,

Complainant,

v.

KAREN S. DAY,

Respondent.

The uncontested amended petition for leave to resign without leave to reapply is approved effective December 19, 1988, thereby giving respondent thirty (30) days to close out her law practice. During the close out period she shall not accept any new business.

Not final until time expires to file motion for rehearing and, if filed, determined. The filing of a motion for rehearing shall not alter the effective date of this resignation.

A True Copy
TEST:

/s/ Sid J. White
Sid J. White
Clerk, Supreme Court

TC
cc: Jan K. Wichrowski, Esquire
John T. Berry, Esquire
Karen S. Day, Esquire